Supreme Court, U.S.
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NO. 98-1064

In The

Supreme Court of the United States

October Term, 1998

American Academy of Pain Management
a California Non Profit Corporation, ARNOLD FOX, M.D.,
an individual, and B. ELLIOT COLE, M.D., an individual,
Petitioners,

v.

RONALD JOSEPH in his official capacity as the
Executive Director of the Medical Board
of California and not personally.
Respondent.

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the use of the term "Board certified" or "Board Certification," in advertising, by a physician member of a certification board, inherently misleading when the certification board lacks "objective and consistently applied standards" for certification and/or because the advertising of "board certification" does not meet state standards?

PARTIES

Respondent agrees with petitioners' designation.

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OPINION BELOW

Respondent agrees with petitioners' description.

CONCISE STATEMENT OF THE FACTS

Respondent disagrees with petitioner that the Ninth Circuit Court of Appeals' decision conflicts with other circuits, other decisions of the Ninth Circuit, and the California Supreme Court.

CONSTITUTION AND STATUTES

Respondent agrees with petitioners' designation.

STATEMENT OF THE CASE

California Business and Professions Code section 651 states in pertinent part that it is unlawful for a licensed professional to disseminate public communication which contains a false, fraudulent, misleading, or deceptive statement or claim. In 1990, SB 2036 (McCorquodale) added section 651(h)(5) which addresses the advertising of medical specialty boards. Section 651(h)(5) sets out minimum standards that physicians and surgeons must meet before advertising that they are "board certified" in a particular medical specialty. Subsequently in 1992, AB 2180 (Felando) was enacted into law. This legislation expanded the scope of section 651(h)(5) to include "multi-

disciplinary" boards or associations as it applied to their physician members with respect to advertising specialty board certification status. (See Bus. & Prof. Code, Sec. 651(h)(5)(B) attached to Petitioners' brief, pps. 49a-55a and Judge Lawrence K. Karlton's Order denying Petitioners' Preliminary Injunction attached to Petitioners' brief pps. 16a-17a, hereafter "Or. Excerpt".)

California Business and Professions Code section 651(h)(5) defines three criteria under which physicians may advertise specialty board certification. Those criteria are that the specialty board must either (1) be approved by the American Board of Medical Specialties ("ABMS"); (2) have an Accreditation Council for Graduate Medical Education ("ACGME") approved post-graduate training program in that specialty or sub-specialty area of medicine; or (3) have "equivalent" requirements approved by the Medical Board. (See Bus.& Prof. Code § 651(h)(5)(B). ABMS is the nationally recognized entity that approves medical specialty boards. ACGME is the nationally recognized entity that reviews and accredits postgraduate medical education and training programs. (Bus. & Prof. Code § 651(h)(5)(B) Petitioners' excerpts, pps. 51a-51b.)

The Medical Board of California is a statewide agency authorized to license physicians and surgeons to

practice in California. See California Business and Professions Code section 101(b).

To comply with Bus. & Prof. Code § 651(h)(5), the Medical Board promulgated regulations found at Title 16, California Code of Regulations, section 1363.5 (hereinafter "the Regulations") which were adopted in March 1994. (See Title 16, Calif. Code of Reg., sec. 1363.5 attached to Petitioners' brief, pps. 56a-64a.)

The Regulations were promulgated by the Medical Board to develop and define parameters for "equivalent" standards that a medical specialty board must satisfy in order for their physician and surgeon members to advertise the specific term "board certification" in a particular specialty or sub-specialty area of medicine. The Regulations ultimately adopted in March of 1994 reflect the inclusion of advertising of board certification by physicians who are members of the multi disciplinary specialty boards. (Title 16, Calif. Code of Reg., § 1363.5(b)(3) Petitioners' excerpts pps. 56a-57a.)

The ABMS board certification is a process that attempts to improve the quality of patient care by providing assurance to the public that a certified physician specialist has successfully completed an approved postgraduate training program and an evaluation which includes an examination process designed to assess the knowledge, skills, and experience necessary for the provision of quality patient care in that specialty. It is this

objective that the Medical Board sought to preserve in the Equivalency Track. Furthermore, under the Board's regulations, the words "board certification" means to the California physician and his/her patient that the certified physician has specialized training and knowledge that is either ABMS approved or meets equivalent standards. Additionally, though consumers assume board certified physicians have a great deal of special education and training beyond what is required to be licensed to practice medicine, they lack the expertise to discern the differences in claims of advanced education and/or training by physicians contained in the concept of board certification.

In April 1996, the American Academy of Pain Management (hereinafter "AAPM", "Academy" or "Petitioner") applied for specialty board recognition, as part of the Equivalency Track that was set up in the Medical Boards regulations. In response, the Medical Board hired William K. Hamilton, M.D., as a consultant. Dr. Hamilton reviewed AAPM's application and submitted a written report of his findings to the Medical Board. (Or. Excerpt 18a.)

The Medical Board of California denied the Academy's application on February 7, 1997. It supported its rejection of petitioner's application on the basis of a variety of findings and conclusions. With respect to testing, it noted that the Academy gives a two-hour test consisting of one hundred multiple choice questions,

whereas under the regulation, in order to be equivalent a board must offer a sixteen hour test. Title 16, Cal. Code Regs. § 1363.5(b)(10). The Medical Board of California also concluded that of the 5,000 pain practitioners who were certified at the time of application, only approximately 1,000 have taken the test. (Or. Excerpt pps. 18a and 19a.)

With regard to training, the Medical Board found that the Academy does not currently require any formal postgraduate training. It also concluded that the Academy's proposal for future training programs was deficient because no clinical training was contemplated.[1/]

With regard to the structure of the organization, the Medical Board concluded that the Academy's governing body was not stable and independent since it does not have staggered term limits of not more than six years, and because no provision is made for outside input into the selection of board members. (Or. Excerpt p. 19a.)

The district court denied AAPM's motion for preliminary injunction to stay the enforcement of Bus.& Prof. Code § 651(h)(5)(B) which prohibited use of the term "board certified" by any physician member of any

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1. The District Court agreed with the Board's findings. Petitioner, AAPM, failed to submit evidence that they required post-graduate training or that they required their members to take a test. (Judge Karlton's order denying reconsideration attached to Petitioners' brief hereafter Or. Rec. Excerpt p. 11a)

certifying boards unless the certifying board met ABMS standards or its equivalent as approved pursuant to regulation by the California Medical Board. In summary, the district court found that because petitioner AAPM failed to demonstrate that it has objective and consistently applied standards, and/or because petitioners advertising certification does not meet state standards, then such advertising claim is inherently misleading. Therefore, the statute comports with the First Amendment. (Or. Excerpt p. 24a.)

When petitioners appealed Judge Karlton's order denying their request for a preliminary injunction to the Ninth Circuit, that court found that the district court's finding was not an abuse of discretion. The Ninth Circuit upheld the lower court's finding that AAPM members' use of the term "board certified" was not protected commercial speech under the Central Hudson test because the phrase was inherently misleading. (Ninth Circuit Opinion pps. 3a-4a attached to petitioners brief, hereinafter Ninth Cir Op. Excerpt.)

ARGUMENT

I.

BOTH THE DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT AAPM MEMBERS' USE OF THE TERM "BOARD CERTIFICATION" WAS INHERENTLY MISLEADING

The District Court found when denying petitioners' preliminary injunction that the State may completely ban commercial speech that is either actually or inherently misleading, citing Peel v. Attorney Discipline Comm. 496 U.S. 93, 109 (1991). (Or. Excerpt pp. 21a.) Further, the court held that because petitioner AAPM does not have "objective and consistently applied standards" in the areas of postgraduate training and testing, and/or because advertising certification that does not meet state standards, use of the term "Board Certified" or "Board Certification" is inherently misleading. Therefore, the court found that the application of Bus. & Prof. Code § 651(h)(5)(B) to ban AAPM members' use of the term "board certification" is not a violation of petitioners' First Amendment rights.

The Ninth Circuit Court of Appeals found that the district court's denial of petitioners' application for a preliminary injunction was not an abuse of discretion. (Ninth Cir. Op. Excerpt p. 2a.) The Ninth Circuit cited the Supreme Court four-part test under which the constitutionality of government regulations of commercial speech should be analyzed:

(1) whether the expression is protected by the First Amendment;

(2) whether the commercial speech concerns lawful activity and is misleading;

(3) whether the asserted governmental interest is substantial.

(4) if the answers to (2) and (3) are yes, the Court must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. The Ninth Circuit then cited Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980) as basis of the four-part test.

The Ninth Circuit emphasized that the district court rightfully found that the expression at issue in this case is "inherently misleading" and therefore unprotected by the First Amendment. (Ninth Cir. Op. Excerpt p. 3a.)

The Ninth Circuit subsequently cited a four-factor test[2/] under Association of National Advertisers v. Lungren, 44 F.3d 726, 731 (9th Cir. 1994) to determine whether an expression is inherently misleading. The Ninth Circuit conceded that the district court did not expressly consider these factors. Despite the district court not considering these factors, the Ninth Circuit nonetheless determined that a preliminary injunction was not warranted and therefore the district court did not abuse its discretion. (Ninth Cir. Op. Excerpt p. 3a.)

Though petitioners make the argument that the Association of National Advertisers v. Lungren case is inconsistent with Peel and Central Hudson decisions (Petitioners' brief pps. 3-4), there does not appear to be any inconsistency among the cases. Rather, in Nat. Advertisers there is a slightly different articulation of a four-part test to determine if an expression is inherently misleading.

Despite the fact that petitioners repeatedly claim in their pleadings that their members' advertisements regarding "board certification" are truthful communications, respondent has disproved this claim, as

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2. That four-part test is (1) whether the speech restricted is devoid of intrinsic meaning (2) the possibilities for deception (3) whether experience has proved that in fact such advertising is subject to abuse; and (4) the ability of the intended audience to evaluate the claims made. [Assoc. of Nat. Advertisers v. Lungren, 44 F.3d 726, 731 (9th Cir. 1994.)]

supported by the findings of the district court and the Ninth Circuit Court of Appeals.

II.

THE PEEL CASE ACKNOWLEDGED THAT THE ABMS AND RESPONDENT HAVE SET THE PROPER STANDARD FOR PHYSICIAN ADVERTISING

Petitioners cite the case of Peel v. Attorney Disciplinary Committee, 496 U.S. 91 (1990) which sets forth a standard for the regulation of commercial speech, and claim that the Ninth Circuit did not consider this standard. This is incorrect. Though the Ninth Circuit opinion does not specifically cite Peel, the case was discussed in oral argument. Additionally, the district court specifically relied on Peel. (Or. Except pp. 13a.)

In Peel, when confronted with a far different evidentiary record, the Court declared unconstitutional a state statute which impacted attorney advertising. The statute in Peel imposed a total ban on an attorney's ability to advertise legitimate specialty status and/or expertise unless the attorney's practice fell within certain practice categories defined by the state bar regulation in question. For example, the state bar allowed attorneys to advertise that they were bankruptcy and/or patent specialists, yet

disallowed advertising as a civil trial specialist. The present case is fundamentally different because the Medical Board's regulation is narrowly drawn to address misrepresentation concerns over the phrase "board certification" in advertising. The regulation specifically contemplates advertising of specialty board status. (Title 16, Cal.Code of Regulations, § 1363.5(b)(3).) The regulation requires that certain nationally recognized standards be met before a physician can use the term "board certified" in a specific field of medicine. Should a physician be certified by a private specialty board that does not meet the national standard, that physician may still advertise that he "specializes" in a given field and he may also advertise that he is a member of the organization. He or she simply cannot use the term "board certified."

In fact, the Peel decision acknowledges that ABMS board certification is based on various requirements of education, residency, examination and evaluation. Further, the Peel court found that though the average member of the public does not know or necessarily understand these ABMS requirements, board certification has "come to be regarded as evidence of skill and proficiency to those to whom they [have] been issued." Peel, supra 496 U.S. at 102-103, fn. 11.

In Peel, the Court recognized that a state may, consistent with the First Amendment, enact regulations

concerning potentially misleading statements by lawyers as to their private certification or specialization. Where such regulations are less restrictive than a total ban, the state may screen certifying organizations so as to distinguish between bona fide boards or associations which issue such certification of specializations and boards or associations which also issue such certification but do so utilizing improper standards. Peel, supra, 496 U.S. at 110.

The same reasoning applies to the Board's promulgation of the regulations, which seek to establish standards for distinguishing between bona fide boards and associations which issue certifications in specific fields of medicine, and those boards and associations which do not meet appropriate standards. Thus, the public may be mislead into believing that a member physician is specially qualified to administer treatment in a medical specialty. Peel, supra 496 U.S. at 109.

The non-ABMS boards that apply to the Medical Board for Equivalency Track recognition under the regulation are in essence "screened" to determine if their claims regarding their board certification of members are in fact misleading. Since petitioners' board certification process did not require any postgraduate training in the specialty field of pain management, and their two hour examination was insufficient, AAPM's claims regarding board certification are inherently misleading and their use

of the term "board certified" in the field of pain management is prohibited. AAPM members can still advertise that they specialize in the field of pain management or that they are a diplomat of the AAPM.

III.

ANY CONFLICT IN THE CIRCUIT COURTS AS TO WHAT TEST IS APPLIED TO POTENTIALLY MISLEADING SPEECH IS IRRELEVANT SINCE THE NINTH CIRCUIT NEVER REACHED THAT ISSUE BECAUSE THE COURT FOUND AAPM MEMBERS' USE OF "BOARD CERTIFICATION" IN ADVERTISING WAS NOT PROTECTED SPEECH

Petitioners claim that because the Ninth Circuit cited a four-prong
test in Assoc. of Nat. Advertisers v. Lungren 44 F.3d 726, 731 (9th Cir. 1994) the decision of that case somehow contradicts Peel v. Attorney Registration & Disciplinary Comm'n of Illinois, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990). (Petitioners' brief, p. 3.)

First, the Ninth Circuit never got to the merits of Assoc. of Nat. Advertisers v. Lungren, supra, because the

district court never expressly considered these factors. (Ninth Cir. Op. Excerpt, p. 3a.) Second, since both the district court and Ninth Circuit found that the speech in question was inherently misleading and not protected speech, neither court needed to move through the remaining prongs of the Central Hudson test. Third, the district court specifically relied on Peel, supra, for its key finding. Judge Karlton specifically found that since AAPM did not have "objective and consistently applied standards"[3] as required by Peel, supra, and that since AAPM members' use of the term "board certified" did not meet state standards, such term was therefore inherently misleading. The Ninth Circuit affirmed the District Court finding. (Ninth Cir. Op. Excerpt, pps. 21a-24a.) And finally, petitioners have failed to articulate in their brief in what manner Assoc. of Nat. Advertisers v. Lungren, supra is in conflict with the Peel case.

Therefore, since the Ninth Circuit never applied the Nat. Advertisers test, the Supreme Court should deny certiorari because petitioners have failed to demonstrate any conflict in the circuit court opinions. Furthermore, even if there is a potential conflict between Nat. Advertisers test and any other circuit decision, such potential conflict is not a sufficient reason for granting

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3. AAPM had no requirement for postgraduate training and/or no "enforced" requirement that all AAPM members take a test to prove their knowledge base.

review. See Stern, Gressman, Shapiro and Geller, Supreme Court Practice (1993) Bureau of National Affairs pp. 172 citing Sanson Hosiery Mills v. NLRB, 344 U.S. 863 (1952). The Arlington, Inc. v. Mayer, 339 U.S. 965 (1950).

Additionally, though petitioners also claim a conflict between circuit court cases, (See pp. 1 Petitioners' Brief) they do not illustrate which cases they are referring to and in what way they conflict. Instead, petitioners merely attach an unreported district court decision from Florida involving a different statute that regulates the advertising of dentists. (Petitioners cite and attach Borgner v. Cook, Petitioners' Excerpt pps. 33a-48a) In general, the Supreme Court does not grant certiorari to review a decision of a federal court of appeals merely because it is in conflict on a point of federal law with a decision rendered by a district court. District court decisions are not a final decision for purposes of review, in the same way that court of appeals decision are. Stern, Gressman, Shapiro, and Geller Supreme Court Practice, supra at 178.

Furthermore, even if this court were to consider Borgner v. Cook, it is clear that the conflict between that case and the one before this court is merely factual. In reaching its decision, the court in Borgner was relying on a different set of facts than were present in the instant case. The Borgner court relied on the Peel case, among other cases, in reaching its conclusion.

IV.

ADVERTISING BY PROFESSIONAL POSES SPECIAL RISKS OF DECEPTION

In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the United States Supreme Court struck down a total ban on advertising by attorneys as a violation of the First Amendment of the United States Constitution. However, the United States Supreme Court, supra, at 383-384, clearly stated that its holding did not preclude restraint on false, deceptive or misleading advertising such as claims about the quality of services, which are not subject to measurement or verification and that there may be reasonable restrictions on time, place and manner of advertising.

The Bates court's reasoning is instructive. The Court recognized that advertising by the professions poses special risks of deception: "because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Bates, 433 U.S. supra at 383 [cited in *In re RMJ* (1982) 455 U.S. 191, 200]. Similarly, with physicians advertising medical specialties, the public lacks the sophistication to determine whether "board certification" means that the doctor has met a national

standard or has simply paid a fee to a "bogus board" for a piece of paper.

In Virginia State Board Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748(1976), the court found that distinctions between the professions may require consideration of different factors, specifically pointing out that physicians and lawyers do not dispense standardized products but professional services, and may be treated differently than those who do dispense standardized products. Id. at 775, fn. 25.

The intent of the Medical Board's regulations is to protect the public from misleading advertising by physicians and surgeons relative to their level of training and qualifications. The ACGME and the ABMS set the national minimum standards respectively. The danger when a physician advertises "board certification" without meeting ABMS specialty board standards or their "equivalent" is that the consumer may assume that certification is evidence of skill and proficiency in that specialty that meets national standards, which may not be true. As a consequence, physicians who hold themselves out to the public as being "board certified" when in fact their specialty board does not meet the national standards or their "equivalents" are engaging in false or misleading advertising.

Petitioners cite 44 Liquormart *v.* Rhode Island, 940 F.S. 4137, 116 S.Ct. 1495 (1996) (which involved a

ban on advertising liquor store price), which does not deal with advertising by professionals which pose "special risks of deception" as noted by the Bates court. Bates, 433 U.S. at 383. The 44 Liquormart court found that regulations that entirely suppress commercial speech in order to pursue a policy not related to consumer protection must be reviewed with "special care" and such blanket bans should not be approved unless the speech itself was flawed in some ways, such as the speech being deceptive. (*Id.* at 1499.) As was addressed by the district court and the Ninth Circuit Court of Appeals, the proper review for this type of professional advertising is not found in 44 Liquormart but in Peel, Central Hudson and Bates.

V.

THE STATE CAN DEFINE THE ACCEPTABLE USAGE OF A WORD IN ADVERTISING

Petitioners also seem to assert that this court should grant certiorari because Kale v. South Carolina Department of Health and Environmental Control, 301 S.C. 277, 391 S.E.2d 573 is inconsistent with Peel. (Petitioners' brief pps 15-16.) In Kale, the court looked at the legal definition of the word "hospital" to decide that the term "chiropractic hospital" was deceptive because hospitals are defined as providing medical and surgical

care. Id. at 574. That method of looking at the accepted usage of a term is analogous to the facts in this case. The California Legislature has defined medical specialty board certification to mean a certain level of postgraduate training in the medical specialty, and a valid examination of the subject material learned in the postgraduate training program. This is consistent with the Peel decision which held that "objective and consistently applied standards" can be the basis for the regulation of advertising Board certification. Peel, supra at pp. 109.

The rationale of the Kale and Peel cases is also consistent with the case of the Assoc. of Nat. Advertisers, Inc. v. Lungren, 44 F.3d 726 (9th Cir. 1994). This case involved a California statute prohibiting manufacturer or distributor of consumer goods from representing that its products were "ozone friendly", "biodegradable", "photo-degradable", "recyclable" or "recycled" unless goods met the statute's definition of those terms. Affirming the trial court, the Ninth Circuit found it acceptable for the state to define potential misleading terms. Id. at 731.

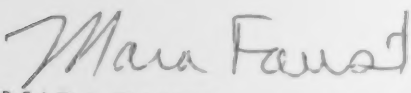
CONCLUSION

Petitioners have not met the criteria for this court to grant certiorari. Petitioners have failed to demonstrate an actual conflict between the case. Therefore, petitioners' writ of certiorari should be denied.

Dated: January 29, 1999.

Respectfully submitted,

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REPLY BRIEF

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REPLY
TO THE OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

American Academy of Pain Management replies because the Opposition introduced a new argument. The Opposition rephrased the questions on appeal and by doing so introduced a new argument not directly raised by the Opinion of the Ninth Circuit Court of Appeals and not presented by the Petitioner. When the new argument is introduced, it makes the new questions presented similar to "when did you stop beating your wife" type of questions. These new types of questions assume that the Petitioner does not have objective and consistently applied standards. This assumption is made without a trial. This assumption presumes the regulatory defined standards are the only possible standards. This assumption assumes without trial that the Petitioner cannot prove equivalence with the regulatory standard.

In rephrasing the "Question Presented" the Opposition not only changes the question but presents a new compound question with two parts.

One of the questions raised by the Opposition is the following: Is the use of the term "Board Certified" or "Board Certification," in advertising, by a physician member of a certification board, "inherently misleading" [merely] because the advertising of "Board Certification" does not meet state standards?

The second question raised by the Opposition is the factual-legal question: Does the Petitioner have

objective and consistently applied standards?

The Opposition states incorrectly that the Court of Appeals found the AAPM use of the term "board certification" inherently misleading. The Court of Appeals did not find "inherently misleading" the Petitioners' use of "Board Certified." The Opposition mistakenly asserts such was the case. The Opposition does so by citing page 3a and 4a of the Petition. Page 3a and 4a is the Opinion of the Ninth Circuit Court of Appeals which reference the Opinion of the District Court.

The District Court did not try this case. The District Court denied a motion for preliminary injunction. The District Court denied the motion with an Opinion which had effectively ended the Petitioners' case without trial. The District Court decided,

> "Once a state has set such standards, advertising certification from a board that does not meet such standards [those set by the state] is inherently misleading."
> page 23a, District Court Order dated May 23, 1997 denying a preliminary injunction.

Insofar as the words used by the Opposition suggest a finding that the AAPM use of the term "Board Certified" is factually misleading, this introduces a factual-legal question which is not present in the record, and on which there has been no trial. The finding of "inherently misleading" is a finding of the District Court and not of the Ninth Circuit Court of Appeals. The District Court rifled its ruling, in its final analysis, and based its ruling on the requirements of Statute and the Regulation. See Petition, page 23a, lines 6-14.

What the Opposition proposes is that the state may define the words "Board Certified" by defining standards which exhaustively set standards for the use of the words "Board Certified." Once the standards are defined, any other use is conclusively presumed to be "inherently misleading." This conclusive presumption removes the need for the tests of Central Hudson and Peel. The Peel Court found the words "board certified" were not "inherently misleading," were entitled to the scrutiny due commercial speech under the First Amendment, and not deserving of prohibition if more disclosure eliminates the possibility of confusion. The Opposition proposition impermissibly shifts the burden of proof to the speaker. This takes from the Courts and places in the hands of a Legislature and or an Administrative Agency the role of defining which speech is "inherently misleading." This proposition gives the state the power to prohibit and criminalize truthful speech by defining truthful speech as "inherently misleading" speech. This allows the regulator to enunciate the words "inherently misleading" and to prohibit speech at a pretrial proceeding. This violates the Supreme Court's ruling cautioning against hasty prohibitions of commercial speech.

> "...[W]e cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'"
> Ibanez v. Florida (1994) 512 U.S. 136,146, 114 S.Ct. 2084, 2090, 129 L.Ed.2d 118.

The new questions raised by the Opposition more clearly focuses on the danger posed by the Ninth Circuit Court of Appeals decision which rewrites the rules protecting commercial speech.

Respectfully submitted,

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SUPPLEMENTAL REPLY BRIEF TO THE OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

American Academy of Pain Management files this Supplemental Reply Brief because a January 15, 1999 decision of the Court of Appeals for the District of Columbia Circuit creates a conflict between that Court and the Court of Appeals for the Ninth Circuit. This is in addition to the conflicts already existing between the conflicts with the Second, Fifth, Ninth and Eleventh Circuits

This new decision is Pearson v. Shalala of the Court of Appeals for the District of Columbia Circuit. This case emphasizes the necessity of permitting the use of disclaimers where there is "potentially misleading" or allegedly "inherently misleading" advertising which can be made not misleading through additional disclosure. A copy of the case, as made available through Westlaw, is attached in the Supplemental Appendix.

The Court of Appeals requires the alternative of more disclosure in the following words:

> "As best we understand the government, its first argument runs along the following lines: that health claims lacking "significant scientific agreement" are inherently misleading because they have such an awesome impact on consumers as to make it virtually impossible for them to exercise any judgment at the point of sale. It would be as if the consumers were asked to buy something while hypnotized, and therefore they are bound to be misled.

> We think this contention is almost frivolous. See Peel, 496 U.S. at 105, 110 S.Ct. 2281"
> Pearson v. Shalala, Supplemental Appendix, page 10, not officially reported at this time.

The Pearson v. Shalala specifically rejected the Lungren decision which allowed a more deferential and tolerant treatment of statutory and regulatory control of potentially misleading commercial speech.

> "Nor do we agree with the FDA's suggestion (and the Ninth Circuit's holding in Association of Nat'l Advertisers v. Lungren, 44 F.3d 726, 736 (9th Cir.1994)) that the Supreme Court's decision in Fox—a case that did not involve assertedly misleading commercial speech—mandates a more deferential review of government regulations on potentially misleading commercial speech."
> Pearson v. Shalala, Supplemental Appendix, page 15a, not officially reported at this time.

It is these conflicts of the Circuit Courts of Appeals which demonstrates the need to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Durk PEARSON and Sandy Shaw, American Preventive Medical Association and Citizens for Health, Appellants,

v.

Donna E. SHALALA, Secretary, United States Department of Health and Human Services, et al., Appellees.

No. 98-5043, 98-5084. (Cite as: 1999 WL 12782 (D.C.Cir.))United States Court of Appeals,District of Columbia Circuit. Decided Jan. 15, 1999.

Manufacturers, distributors and consumer organizations brought suit challenging Food and Drug Administration (FDA) regulations that required sellers of dietary supplements to obtain FDA authorization before labeling such supplements with "health claims." The United States District Court for the District of Columbia, 14 F.Supp.2d 10, dismissed action, and plaintiffs appealed. The Court of Appeals, Silberman, Circuit Judge, held that: (1) proposed health claims were not inherently misleading; (2) FDA was required, under commercial speech doctrine, to consider whether inclusion of appropriate disclaimers would negate potentially misleading nature of health claims; and (3) FDA's failure to define phrase "significant scientific agreement" in regulation governing authorization of health claims violated Administrative Procedure Act.

Reversed and remanded with instructions.

Jonathan W. Emord, Burke, VA, argued the cause for appellants. With him on the briefs were James S. Turner, Bellevue, WA, and Betsy E. Lehrfeld.

Christine N. Kohl, Attorney, United States Department

of Justice, argued the cause for appellees. With her on the brief were Frank W. Hunger, Assistant Attorney General, Wilma A. Lewis, United States Attorney, and Douglas N. Letter, Attorney, United States Department of Justice.

Nancy T. Lord-Johnson was on the brief for amici curiae Direct Aids Alternative Information Resources, et al.

David C. Vladeck, Allison M. Zieve, and Bruce Silverglade were on the brief for amici curiae American Cancer Society, et al.

Before: WALD, SILBERMAN, and GARLAND, Circuit Judges.

SILBERMAN, Circuit Judge:

*1 Marketers of dietary supplements must, before including on their labels a claim characterizing the relationship of the supplement to a disease or health-related condition, submit the claim to the Food and Drug Administration for preapproval. The FDA authorizes a claim only if it finds "significant scientific agreement" among experts that the claim is supported by the available evidence. Appellants failed to persuade the FDA to authorize four such claims and sought relief in the district court, where their various constitutional and statutory challenges were rejected. We reverse.

I.

Dietary supplement marketers Durk Pearson and Sandy Shaw, presumably hoping to bolster sales by increasing the allure of their supplements' labels, asked the FDA to authorize four separate health claims. (Pearson and Shaw are supported by two other

appellants, the American Preventive Medical Association, a health care advocacy organization whose members are health care practitioners, and Citizens for Health, a health care advocacy organization whose members are consumers of dietary supplements.) A "health claim" is a "claim made on the label or in labeling of ... a dietary supplement that expressly or by implication ... characterizes the relationship of any substance to a disease or health-related condition." 21 C.F.R. § 101.14(a)(1) (1998). Each of appellants' four claims links the consumption of a particular supplement to the reduction in risk of a particular disease:

(1) "Consumption of antioxidant vitamins may reduce the risk of certain kinds of cancers."

(2) "Consumption of fiber may reduce the risk of colorectal cancer."

(3) "Consumption of omega-3 fatty acids may reduce the risk of coronary heart disease."

(4) ".8 mg of folic acid in a dietary supplement is more effective in reducing the risk of neural tube defects than a lower amount in foods in common form."

Understanding the preapproval requirement for health claims on dietary supplements requires a brief excursus on the broader regulatory framework applicable to dietary supplements, foods, and drugs. A "dietary supplement" is a "product (other than tobacco) intended to supplement the diet" that contains one or more of certain dietary ingredients, including a vitamin, a mineral, an herb or other botanical, or an amino acid, 21 U.S.C.A. § 321(ff)(1)(A)- (D) (Supp.1998) (emphasis added), "is not represented for use as a conventional food or as a sole item of a meal or the diet," id. § 321(ff)(2)(B), and "is labeled as a dietary supplement," id. § 321(ff)(2)(C). A "drug" includes, inter

alia, "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease." 21 U.S.C.A. § 321(g)(1)(B) (Supp.1998). If the product is a "new drug," the product must survive the arduous drug approval process, see 21 U.S.C.A. § 355 (Supp.1998), before the manufacturer may introduce it into interstate commerce, id. § 355(a); see also 21 U.S.C.A. § 343(r)(1)(B) (Supp.1998) (deeming "misbranded" a dietary supplement whose label includes a health claim); 21 U.S.C. § 331 (1994) (prohibiting the introduction of a misbranded product into interstate commerce); 21 U.S.C.A. § 333 (Supp.1998) (prescribing penalties for violations of § 331).

*2 Although there is apparently some definitional overlap between drugs and dietary supplements under the statute, it creates a safe harbor from designation as a "drug" for certain dietary supplements whose labels or labeling [FN1] advertise a beneficial relationship to a disease or health- related condition: If the FDA authorizes a label claim under 21 U.S.C.A. § 343(r), the product is not considered a drug under 21 U.S.C.A. § 321(g)(1). The FDA authorizes a claim only when it determines, based on the totality of publicly available scientific evidence (including evidence from well-designed studies conducted in a manner which is consistent with generally recognized scientific procedures and principles), that there is significant scientific agreement among experts qualified by scientific training and experience to evaluate such claims, that the claim is supported by such evidence. 21 C.F.R. § 101.14(c) (1998). The FDA's authorization comes by an informal rulemaking under the Administrative Procedure Act. See 21 C.F.R. § 101.70 (1998); 5 U.S.C. § 553 (1994). This choice of a

rulemaking rather than an adjudication—which would seem a more natural fit for this individualized determination—was mandated by Congress for the regulation of health claims on food labels, see 21 U.S.C.A. § 343(r)(3)(B)(i), and then adopted by the FDA as well for the regulation of health claims on dietary supplement labels, see id. § 343(5)(D) (authorizing but not specifying regulatory procedure); 21 C.F.R. § 101.70.

The requirement that health claims be approved before being added to the label of a dietary supplement constitutes the primary regulatory hurdle faced by marketers of dietary supplements. The actual sale of dietary supplements is regulated only when the supplement contains a "new dietary ingredient," 21 U.S.C.A. § 350b (Supp.1998), or poses a safety risk, id. § 342(f). See also Food Labeling; General Requirements for Health Claims for Dietary Supplements, 59 Fed.Reg. 395, 396 (1994) (explaining that "the availability of dietary supplements will not be affected by these regulations [of health claims]").

The safe harbor from "drug" status for dietary supplements bearing FDA- approved health claims did not always exist. Prior to 1984, the FDA took the position that a statement that consumption of a food could prevent a particular disease was "tantamount to a claim that the food was a drug ... and therefore that its sale was prohibited until a new drug application had been approved." H.R.REP. NO. 538, 101st Cong., 2d Sess. 9 (1990), reprinted in 1990 U.S.CODE CONG. & ADMIN.NEWS 3336, 3338. But during the mid-1980s, companies began making health claims on foods without seeking new drug approval, a practice that the FDA supported in regulations proposed in 1987. Id. at 3338-39. Congress became concerned that health

claims were increasingly common in the marketplace, and that the FDA had not issued clear, enforceable rules to regulate such claims. Id.

*3 Against this background, and in light of the further concern that the FDA might lack statutory authority to permit health claims on foods without also requiring that the claim meet the premarket approval requirements applicable to drugs, see id., Congress enacted the Nutrition Labeling and Education Act of 1990 (NLEA), Pub.L. No. 101-535, 104 Stat 2353 (codified as amended at 21 U.S.C.A. §§ 301, 321, 337, 343, 371 (1972 & Supp.1998)). The NLEA addressed foods and dietary supplements separately. A health claim on a food may be made without FDA approval as a new drug, or the risk of sanctions for issuing a "misbranded" product, if it has been certified by the FDA as supported by "significant scientific agreement." Id. § 343(r)(3)(B)(i). Congress created a similar safe harbor for health claims on dietary supplements, but delegated to the FDA the task of establishing a "procedure and standard respecting the validity of [the health] claim." Id. § 343(r)(5)(D).

The FDA has since promulgated 21 C.F.R. § 101.14—the "significant scientific agreement" "standard" (quoted above)—and 21 C.F.R. § 101.70—a "procedure" (not particularly relevant to this case)—for evaluating the validity of health claims on dietary supplements. [FN2] In doing so, the agency rejected arguments asserted by commenters—including appellants—that the "significant scientific agreement" standard violates the First Amendment because it precludes the approval of less-well supported claims accompanied by a disclaimer and because it is impermissibly vague. See 59 Fed.Reg. 395, 405, 422-23 (1994). The FDA explained that, in its view, the

disclaimer approach would be ineffective because "there would be a question as to whether consumers would be able to ascertain which claims were preliminary [and accompanied by a disclaimer] and which were not," id. at 405, and concluded that its prophylactic approach is consistent with applicable commercial speech doctrine, see id. at 423 (discussing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)). The agency, responding to the comment that "significant scientific agreement" is impermissibly vague, asserted that the standard is "based on objective factors" and that its procedures for approving health claims, including the notice and comment procedure, sufficiently circumscribe its discretion.

Then the FDA rejected the four claims supported by appellants. See 21 C.F.R. § 101.71(a) (dietary fiber-cancer), § 101.71(c) (antioxidant vitamins-cancer), § 101.71(e) (omega-3 fatty acids-coronary heart disease) (1998); id. § 101.79(c)(2)(i)(G) (1998) (claim that 0.8 mg of folic acid in a dietary supplement is more effective in reducing the risk of neural tube defects than a lower amount in foods in common form). The problem with these claims, according to the FDA, was not a dearth of supporting evidence; rather, the agency concluded that the evidence was inconclusive for one reason or another and thus failed to give rise to "significant scientific agreement." But the FDA never explained just how it measured "significant" or otherwise defined the phrase. The agency refused to approve the dietary fiber-cancer claim because "a supplement would contain only fiber, and there is no evidence that any specific fiber itself caused the effects that were seen in studies involving fiber-rich

[foods]." 58 Fed.Reg. 53,296, 53,298 (1993) (emphasis added). The FDA gave similar reasons for rejecting the antioxidant vitamins- cancer claim, see id. at 53,302, and the omega-3 fatty acids-coronary heart disease claim, see id. at 53,304. As for the claim that 0.8 mg of folic acid in a dietary supplement is more effective in reducing the risk of neural tube defects than a lower amount in foods in common form, the FDA merely stated that "the scientific literature does not support the superiority of any one source over others." 61 Fed.Reg. 8752, 8760 (1996). The FDA declined to consider appellants' suggested alternative of permitting the claim while requiring a corrective disclaimer such as "The FDA has determined that the evidence supporting this claim is inconclusive." [FN3]

*4 A more general folate-neural tube defect claim supported by appellants— that consumption of folate reduces the risk of neural tube defects—was initially rejected but ultimately approved for both dietary supplement and food labels. See 21 C.F.R. § 101.79 (1998). The parties disagree on what caused the FDA's change of position on this claim. Appellants contend that political objections—Senator Hatch was one of the complainers—concentrated the agency's mind. The FDA insists that its initial denial of the claim was based on a concern that folate consumption might have harmful effects on persons suffering from anemia, and that its concern was alleviated by new scientific studies published after the initial denial of the claim.

Appellants sought relief in the district court, raising APA and other statutory claims as well as a constitutional challenge, but were rebuffed. Pearson v. Shalala, 14 F.Supp.2d 10 (D.D.C.1998). [FN4]

II.

Appellants raise a host of challenges to the agency's action. But the most important are that their First Amendment rights have been impaired and that under the Administrative Procedure Act the FDA was obliged, at some point, to articulate a standard a good deal more concrete than the undefined "significant scientific agreement." Normally we would discuss the non-constitutional argument first, particularly because we believe it has merit. We invert the normal order here to discuss first appellants' most powerful constitutional claim, that the government has violated the First Amendment by declining to employ a less draconian method—the use of disclaimers—to serve the government's interests, because the requested remedy stands apart from appellants' request under the APA that the FDA flesh out its standards. That is to say, even if "significant scientific agreement" were given a more concrete meaning, appellants might be entitled to make health claims that do not meet that standard—with proper disclaimers.

Appellants also claim that the agency's "non-definition" runs afoul of Fifth Amendment concerns for vagueness. This contention is, however, closely connected to appellants' APA challenge and may well not be implicated if appellants' APA challenge affords ultimate relief. Therefore we will defer it until our APA analysis.

A. Disclaimers

It is undisputed that FDA's restrictions on appellants' health claims are evaluated under the commercial speech doctrine. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67-68, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). It seems also undisputed that the FDA has

unequivocally rejected the notion of requiring disclaimers to cure "misleading" health claims for dietary supplements. (Although the general regulation does not in haec verba preclude authorization of qualified claims, see Melinda Ledden Sidak, Dietary Supplements and Commercial Speech, 48 FOOD & DRUG L.J. 441, 455 (1993), the government implied in its statement of basis and purpose that disclaimers were not adequate, see 59 Fed.Reg. at 405, and did not consider their use in the four sub-regulations before us, see 21 C.F.R. § 101.71(a), (c), (e); id. § 101.79(c)(2)(i)(G).) The government makes two alternative arguments in response to appellants' claim that it is unconstitutional for the government to refuse to entertain a disclaimer requirement for the proposed health claims: first, that health claims lacking "significant scientific agreement" are inherently misleading and thus entirely outside the protection of the First Amendment; and second, that even if the claims are only potentially misleading, under Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the government is not obliged to consider requiring disclaimers in lieu of an outright ban on all claims that lack significant scientific agreement.

*5 [1][2][3] If such health claims could be thought inherently misleading, that would be the end of the inquiry.

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. [Inherently m]isleading advertising may be

prohibited entirely. But the States may not place an absolute prohibition on ... potentially misleading information ... if the information also may be presented in a way that is not deceptive.

In re R.M.J., 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982); see also Ibanez v. Florida Dep't of Business and Prof'l Regulation, 512 U.S. 136, 144-46, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994); Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91, 99-111, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990). As best we understand the government, its first argument runs along the following lines: that health claims lacking "significant scientific agreement" are inherently misleading because they have such an awesome impact on consumers as to make it virtually impossible for them to exercise any judgment at the point of sale. It would be as if the consumers were asked to buy something while hypnotized, and therefore they are bound to be misled. We think this contention is almost frivolous. See Peel, 496 U.S. at 105, 110 S.Ct. 2281 (rejecting paternalistic assumption that the recipients of a letterhead are "no more discriminating than the audience for children's television"). We reject it. But the government's alternative argument is more substantial. It is asserted that health claims on dietary supplements should be thought at least potentially misleading because the consumer would have difficulty in independently verifying these claims. We are told, in addition, that consumers might actually assume that the government has approved such claims.

[4] Under Central Hudson, we are obliged to evaluate a government scheme to regulate potentially misleading commercial speech by applying a three-part test. First, we ask whether the asserted

government interest is substantial. Central Hudson, 447 U.S. at 566, 100 S.Ct. 2343. The FDA advanced two general concerns: protection of public health and prevention of consumer fraud. The Supreme Court has said "there is no question that [the government's] interest in ensuring the accuracy of commercial information in the marketplace is substantial," Edenfield v. Fane, 507 U.S. 761, 769, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), and that government has a substantial interest in "promoting the health, safety, and welfare of its citizens," Rubin v. Coors Brewing Co., 514 U.S. 476, 485, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). At this level of generality, therefore, a substantial governmental interest is undeniable.

*6 The more significant questions under Central Hudson are the next two factors: "whether the regulation directly advances the governmental interest asserted," Central Hudson, 447 U.S. at 566, 100 S.Ct. 2343 (emphasis added), and whether the fit between the government's ends and the means chosen to accomplish those ends "is not necessarily perfect, but reasonable," Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (discussing Central Hudson, 447 U.S. at 564-66, 100 S.Ct. 2343). [FN5] We think that the government's regulatory approach encounters difficulty with both factors.

It is important to recognize that the government does not assert that appellants' dietary supplements in any fashion threaten consumer's health and safety. [FN6] The government simply asserts its "common sense judgment" that the health of consumers is advanced directly by barring any health claims not approved by the FDA. Because it is not claimed that the product is harmful, the government's underlying—if

unarticulated—premise must be that consumers have a limited amount of either attention or dollars that could be devoted to pursuing health through nutrition, and therefore products that are not indisputably health enhancing should be discouraged as threatening to crowd out more worthy expenditures. We are rather dubious that this simplistic view of human nature or market behavior is sound, but, in any event, it surely cannot be said that this notion—which the government does not even dare openly to set forth—is a direct pursuit of consumer health; it would seem a rather indirect route, to say the least. See Bates v. State Bar of Arizona, 433 U.S. 350, 375, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) ("[W]e view as dubious any justification that is based on the benefits of public ignorance."); cf. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (opinion of Stevens, J., joined by Kennedy, J., and Ginsburg, J.) ("The First Amendment directs us to be especially skeptical of regulations [of indisputably non-misleading information] that seek to keep people in the dark for what the government perceives to be their own good.").

On the other hand, the government would appear to advance directly its interest in protecting against consumer fraud through its regulatory scheme. If it can be assumed—and we think it can—that some health claims on dietary supplements will mislead consumers, it cannot be denied that requiring FDA pre- approval and setting the standard extremely, perhaps even impossibly, high will surely prevent any confusion among consumers. We also recognize that the government's interest in preventing consumer fraud/confusion may well take on added importance in the context of a product, such as dietary supplements,

that can affect the public's health.

*7 [5] The difficulty with the government's consumer fraud justification comes at the final Central Hudson factor: Is there a "reasonable" fit between the government's goals and the means chosen to advance those goals? Fox, 492 U.S. at 480, 109 S.Ct. 3028. The government insists that it is never obliged to utilize the disclaimer approach, because the commercial speech doctrine does not embody a preference for disclosure over outright suppression. Our understanding of the doctrine is otherwise. In Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the Supreme Court addressed an argument similar to the one the government advances. The State Bar had disciplined several attorneys who advertised their fees for certain legal services in violation of the Bar's rule, and sought to justify the rule on the ground that such advertising is inherently misleading "because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill." Id. at 372, 97 S.Ct. 2691. The Court observed that the Bar's concern was "not without merit," but refused to credit the notion that "the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information." Id. at 374-75, 97 S.Ct. 2691. Accordingly, the Court held that the "incomplete" attorney advertising was not inherently misleading and that "the preferred remedy is more disclosure, rather than less." Id. at 376, 97 S.Ct. 2691. In more recent cases, the Court has reaffirmed this principle, repeatedly pointing to disclaimers as constitutionally preferable to outright suppression. See Peel, 496 U.S. at 110, 110 S.Ct. 2281; R.M.J., 455 U.S. at 206 n. 20, 102 S.Ct. 929;

Shapero v. Kentucky Bar Assn., 486 U.S. 466, 478, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988).

The government suggests that the Supreme Court's guidance on this issue is not so consistent (or coherent?). It points to Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979), where the Court, in the course of upholding a ban on the use of trade names by optometrists, stated that "there is no First Amendment rule ... requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication." Id. at 12 n. 1, 99 S.Ct. 887. To be sure, this language cuts against the notion that government must, where possible, regulate misleading commercial speech by requiring disclaimers rather than by imposing an outright ban. But the Court in Friedman made clear the narrowness of its holding as limited to the special status of trade names:

*8 We emphasize ... that the restriction on the use of trade names has only the most incidental effect on the content of the commercial speech of Texas optometrists.... [A] trade name conveys information only because of the associations that grow up over time between the name and a certain level of price and quality of service.... Since the Act does not prohibit or limit the type of informational advertising held to be protected in ... Bates, the factual information associated with trade names may be communicated freely and explicitly to the public.

Id. at 15-16, 99 S.Ct. 887. The government does not assert here that appellants' health claims convey no factual information, only that the factual information conveyed is misleading. Friedman is thus not at odds with the relevant First Amendment principles

established in Bates, which in any event the Supreme Court has reaffirmed—post-Friedman—in R.M.J., Shapero, and Peel.

Nor do we agree with the FDA's suggestion (and the Ninth Circuit's holding in Association of Nat'l Advertisers v. Lungren, 44 F.3d 726, 736 (9th Cir.1994)) that the Supreme Court's decision in Fox—a case that did not involve assertedly misleading commercial speech—mandates a more deferential review of government regulations on potentially misleading commercial speech. In Fox, the Court elaborated on the degree of scrutiny appropriate under the Central Hudson test, making clear that the final step does not require that "the manner of restriction is absolutely the least severe that will achieve the desired end," but only that the fit between the legislature's ends and means is a "reasonable" one. Fox, 492 U.S. at 480, 109 S.Ct. 3028. The Court gave no indication, however, that it was retreating from its holdings in Shapero, R.M.J., and Bates. Rather, the Court described those cases as examples of restrictions that were "substantially excessive, disregarding far less restrictive and more precise means." Fox, 492 U.S. at 479, 109 S.Ct. 3028 (quoting Shapero, 486 U.S. at 476, 108 S.Ct. 1916) (internal quotation marks omitted). It is clear, then, that when government chooses a policy of suppression over disclosure—at least where there is no showing that disclosure would not suffice to cure misleadingness—government disregards a "far less restrictive" means. In any event, we think the Supreme Court's recent decision in 44 Liquormart undermines the Ninth Circuit's holding. The Ninth Circuit relied heavily on Fox's discussion of Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 106 S.Ct.

2968, 92 L.Ed.2d 266 (1986), for the proposition that a court should not second guess a legislative decision to restrict speech rather than to require more speech. Lungren, 44 F.3d at 736 (citing Fox, 492 U.S. at 479, 109 S.Ct. 3028 (quoting Posadas, 478 U.S. at 344, 106 S.Ct. 2968)). But the Supreme Court expressly disapproved of that aspect of Posadas in 44 Liquormart, 517 U.S. at 509- 10, 116 S.Ct. 1495 (plurality) ("Posadas clearly erred in concluding it was 'up to the legislature' to choose suppression over a less speech-restrictive policy.") (quoting Posadas, 478 U.S. at 344, 106 S.Ct. 2968); 44 Liquormart, 517 U.S. at 531-32, 116 S.Ct. 1495 (O'Connor, J., concurring in the judgment). [FN7]

*9 Our rejection of the government's position that there is no general First Amendment preference for disclosure over suppression, of course, does not determine that any supposed weaknesses in the claims at issue can be remedied by disclaimers and thus does not answer whether the subregulations, 21 C.F.R. § 101.71(a), (c), (e); id. § 101-79(c)(2)(i)(G), are valid. The FDA deemed the first three claims—(1) "Consumption of antioxidant vitamins may reduce the risk of certain kinds of cancers," (2) "Consumption of fiber may reduce the risk of colorectal cancer," and (3) "Consumption of omega-3 fatty acids may reduce the risk of coronary heart disease"—to lack significant scientific agreement because existing research had examined only the relationship between consumption of foods containing these components and the risk of these diseases. The FDA logically determined that the specific effect of the component of the food constituting the dietary supplement could not be determined with certainty. (The FDA has approved similar health claims on foods containing these

components. See, e.g., 21 C.F.R. § 101.79 (folate-neural tube defects).) But certainly this concern could be accommodated, in the first claim for example, by adding a prominent disclaimer to the label along the following lines: "The evidence is inconclusive because existing studies have been performed with foods containing antioxidant vitamins, and the effect of those foods on reducing the risk of cancer may result from other components in those foods." A similar disclaimer would be equally effective for the latter two claims.

The FDA's concern regarding the fourth claim—"0.8 mg of folic acid in a dietary supplement is more effective in reducing the risk of neural tube defects than a lower amount in foods in common form"—is different from its reservations regarding the first three claims; the agency simply concluded that "the scientific literature does not support the superiority of any one source [of folic acid] over others." 61 Fed.Reg. at 8760. But it appears that credible evidence did support this claim, see, e.g., DIET AND HEALTH: IMPLICATIONS FOR REDUCING CHRONIC DISEASE RISK 67 (Committee on Diet and Health, Food and Nutrition Board 1989) (concluding that "[l]osses [of folic acid] in cooking and canning [foods] can be very high due to heat destruction"), and we suspect that a clarifying disclaimer could be added to the effect that "The evidence in support of this claim is inconclusive." Cf. American Home Prods. Corp. v. FTC, 695 F.2d 681, 684, 696-702 (3d Cir.1982) (upholding FTC order requiring advertiser who wished to make an unsubstantiated scientific claim to include a disclaimer that the claim was open to substantial question). [FN8]

The government's general concern that, given the extensiveness of government regulation of the sale of drugs, consumers might assume that a claim on a

supplement's label is approved by the government, suggests an obvious answer: The agency could require the label to state that "The FDA does not approve this claim." Similarly, the government's interest in preventing the use of labels that are true but do not mention adverse effects would seem to be satisfied—at least ordinarily—by inclusion of a prominent disclaimer setting forth those adverse effects.

*10 The government disputes that consumers would be able to comprehend appellants' proposed health claims in conjunction with the disclaimers we have suggested—this mix of information would, in the government's view, create confusion among consumers. But all the government offers in support is the FDA's pronouncement that "consumers would be considerably confused by a multitude of claims with differing degrees of reliability." 59 Fed.Reg. at 405. Although the government may have more leeway in choosing suppression over disclosure as a response to the problem of consumer confusion where the product affects health, it must still meet its burden of justifying a restriction on speech—here the FDA's conclusory assertion falls far short. See Ibanez, 512 U.S. at 146, 114 S.Ct. 2084 ("If the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant the [government's] burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.") (citations and internal quotation marks omitted); Edenfield, 507 U.S. at 771, 113 S.Ct. 1792 (invalidating a ban on in-person solicitation by accountants where the government failed to present "studies" or "anecdotal evidence" showing that such solicitation posed dangers of fraud, overreaching, or

compromised independence). [FN9]

We do not presume to draft precise disclaimers for each of appellants' four claims; we leave that task to the agency in the first instance. Nor do we rule out the possibility that where evidence in support of a claim is outweighed by evidence against the claim, the FDA could deem it incurable by a disclaimer and ban it outright. [FN10] For example, if the weight of the evidence were against the hypothetical claim that "Consumption of Vitamin E reduces the risk of Alzheimer's disease," the agency might reasonably determine that adding a disclaimer such as "The FDA has determined that no evidence supports this claim" would not suffice to mitigate the claim's misleadingness. Cf. FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 42-43 (D.C.Cir.1985) (holding, in a false advertising case under the Lanham Act, that a proposed disclaimer would not suffice to cure the misleadingness of an advertising claim). Finally, while we are skeptical that the government could demonstrate with empirical evidence that disclaimers similar to the ones we suggested above would bewilder consumers and fail to correct for deceptiveness, we do not rule out that possibility.

B. The Unarticulated Standard

Wholly apart from the question whether the FDA is obliged to consider appropriate disclaimers is appellants' claim that the agency is obliged to give some content to the phrase "significant scientific agreement." Appellants contend that the agency's failure to do so independently violates their constitutional rights under the First and Fifth Amendments. The First, because producers of dietary supplements are assertedly subject to a "prior restraint" on their protected speech—the labeling of

products. The Fifth, because the agency's approach is so vague as to deprive the producers of liberty (and property?) without due process.

*11 Appellants do not challenge the concept of a prescreening system per se; their complaint is with the FDA's lack of guidance on which health claims will survive the prescreening process. But appellants never connected their vagueness concern with their oblique First Amendment prior restraint argument, and for that reason we need not decide whether prior restraint analysis applies to commercial speech. [FN11] See Carducci v. Regan, 714 F.2d 171, 177 (D.C.Cir.1983). On the other hand, appellants' Fifth Amendment vagueness argument is squarely presented. Still, by prevailing on their APA claim appellants would seem to gain the same relief—invalidation of the FDA's interpretation of the general standard and a remand for more guidance—as they would through a successful Fifth Amendment claim (or indeed a First Amendment prior restraint claim, if it had been properly presented and assuming arguendo that prior restraint analysis applies in the commercial speech context). [FN12]

[6][7] Consideration of this constitutional claim seems unnecessary because we agree with appellants that the APA requires the agency to explain why it rejects their proposed health claims—to do so adequately necessarily implies giving some definitional content to the phrase "significant scientific agreement." We think this proposition is squarely rooted in the prohibition under the APA that an agency not engage in arbitrary and capricious action. See 5 U.S.C. § 706(2)(A) (1994). It simply will not do for a government agency to declare—without explanation—that a proposed course of private action is not approved. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S.

29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) ("[T]he agency must ... articulate a satisfactory explanation for its action...."). To refuse to define the criteria it is applying is equivalent to simply saying no without explanation. Indeed, appellants' suspicions as to the agency's real reason for its volte-face on the general folate-neural tube defect claim highlight the importance of providing a governing rationale for approving or rejecting proposed health claims.

To be sure, Justice Stewart once said, in declining to define obscenity, "I know it when I see it," Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring), which is basically the approach the FDA takes to the term "significant scientific agreement." But the Supreme Court is not subject to the Administrative Procedure Act. Nor for that matter is the Congress. That is why we are quite unimpressed with the government's argument that the agency is justified in employing this standard without definition because Congress used the same standard in 21 U.S.C.A. § 343(r)(3)(B)(i). Presumably—we do not decide—the FDA in applying that statutory standard would similarly be obliged under the APA to give it content.

*12 That is not to say that the agency was necessarily required to define the term in its initial general regulation—or indeed that it is obliged to issue a comprehensive definition all at once. But see n.12 supra. The agency is entitled to proceed case by case or, more accurately, sub-regulation by subregulation, but it must be possible for the regulated class to perceive the principles which are guiding agency action. Accordingly, on remand, the FDA must explain what it means by significant scientific agreement or, at minimum, what it does not mean.

* * * *

For the foregoing reasons, we hold invalid the four sub-regulations, 21 C.F.R. § 101.71(a), (c), (e); § 101.79(c)(2)(i)(G), and the FDA's interpretation of its general regulation, id. § 101.14. The decision of the district court is reversed, and the case is remanded to the district court with instructions to remand in turn to the FDA for reconsideration of appellants' health claims.

So ordered.

FN1. "Label" is defined as "a display of written, printed, or graphic matter upon the immediate container of any article." 21 U.S.C. § 321(k) (1994). "Labeling" is defined as "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." Id. § 321(m).

FN2. The FDA uses the same substantive standard and procedure for the regulation of health claims on foods, see 21 C.F.R. § 101.14, 101.70 (1998), even though the substantive standard and procedure for foods, unlike dietary supplements, was prescribed by statute, see 21 U.S.C.A. § 343(r)(3)(B)(i).

FN3. In general, the FDA appears quite reluctant to approve health claims on dietary supplements; only two are currently authorized. See 21 C.F.R. § 101.72(c)(2)(ii)(C) (calcium-osteoporosis); id. § 101.79(c)(2)(ii)(B) (folate-neural tube defects). The FDA has, however, approved several health claims on foods. See, e.g., id. § 101.72(c)(2)(ii) (calcium-osteoporosis); id. § 101.76 (fiber- containing products-cancer); id. § 101.78 (fruits and vegetables- cancer); id. § 101.79 (folate-neural tube defects); id. § 101.81

(soluble fiber-coronary heart disease).

FN4. Two of our sister circuits have been presented with challenges to the general regulation, 21 C.F.R. § 101.14. (Appellants here challenge not only the general regulation but also its application to deny four specific health claims.) The Tenth Circuit held that the challengers did not have standing because their failure to identify a single claim they wish to make, which could be prohibited under the regulations indicated a lack of a concrete, particularized injury. See National Council for Improved Health v. Shalala, 122 F.3d 878, 884-85 (10th Cir.1997). The Second Circuit held that the absence of a specific proposed health claim rendered a challenge to the general regulation unripe for judicial resolution. See Nutritional Health Alliance v. Shalala, 144 F.3d 220, 225-27 (2d Cir.1998), cert. denied, —- U.S. ——, 119 S.Ct. 589, —- L.Ed.2d —— (1998). The Second Circuit did find the challenge to the claim-review procedure as a prior restraint to be ripe for review, holding on the merits that a restraint of up to 540 days was a reasonable and narrowly tailored mechanism by which the FDA could evaluate whether the proposed claims were truthful and non-misleading. See id. at 227-28.

FN5. In Fox, the University had banned sellers of certain products from operating on its property; its principal interest was to promote an educational rather than commercial atmosphere on the campus. Fox, 492 U.S. at 475, 109 S.Ct. 3028. (Unlike our case, there was no contention that the commercial speech was misleading. Id.) The district court found for the University, and the Second Circuit reversed on the ground that the district court had failed to inquire under

the final step of Central Hudson whether the regulation was the "least restrictive measure" that could effectively protect the state's interests, and remanded for further factfinding. Id. at 472-73, 109 S.Ct. 3028. The Supreme Court in turn reversed, explaining that Central Hudson does not impose a "least restrictive means" requirement, but only mandates a "reasonable" fit between means and ends, id. at 480, 109 S.Ct. 3028, and remanded for application of this standard, id. at 486, 109 S.Ct. 3028.

FN6. Drugs, on the other hand, appear to be in an entirely different category—the potential harm presumably is much greater.

FN7. The government is correct to observe that the existence of sufficient alternative channels of communication would count in its favor at the final step of Central Hudson, see Florida Bar v. Went For It, Inc., 515 U.S. 618, 633-34, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995), but we do not think it is possible to so characterize the situation here. Although a dietary supplement manufacturer remains free to publish articles and books concerning health claims, and may market its dietary supplements with certain physically separate peer-reviewed scientific literature, see 21 U.S.C.A. § 343-2 (Supp.1998), those channels of communication reach consumers less effectively than does a claim made directly on the label because they impose higher search costs on consumers, see John E. Calfee & Janis K. Pappalardo, How Should Health Claims for Foods Be Regulated? 26- 27 (Bureau of Economics, Federal Trade Commission 1989).

FN8. As we noted in Part I supra, there is no indication

that the FDA even considered disclaimers in the context of evaluating these four health claims.

FN9. We recognize that the Supreme Court made these statements in the context of discussing the direct advancement prong of Central Hudson, not the final "reasonable fit" prong. As we noted earlier, we think the government's consumer fraud justification satisfies the direct advancement prong. We rely on Ibanez and Edenfield here because we see no reason why the government's evidentiary burden at the final step of Central Hudson should be any less than at the direct advancement step.

FN10. Similarly, we see no problem with the FDA imposing an outright ban on a claim where evidence in support of the claim is qualitatively weaker than evidence against the claim—for example, where the claim rests on only one or two old studies.

FN11. Compare Nutritional Health Alliance, 144 F.3d at 227-28 (holding that prior restraint analysis applies to commercial speech but that the general health claim regulation, 21 C.F.R. § 101.14, was sufficiently well-defined to survive prior restraint analysis) with Central Hudson, 447 U.S. at 571 n. 13, 100 S.Ct. 2343 (suggesting in dicta that "commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it").

FN12. To be sure, there could be some differences between an APA analysis and a First or Fifth Amendment analysis. It is possible that a standard may be sufficiently well-delineated to satisfy the APA but not the First or Fifth Amendment. And, the APA

may allow the agency to provide guidance in implementation, whereas the First or Fifth Amendment may require the agency to define its standard up front. Neither of these issues is presently before us (they could only conceivably arise after remand to the agency), and we leave them for another day.
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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

American Academy of Pain Management, a California Non-Profit Corporation, Arnold Fox, M.D., an individual, and B. Eliot Cole, M.D., an individual,

Petitioners,

v.

Ronald Joseph in his official capacity as the Executive Director of the Medical Board of California and not personally.

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a preliminary test apply to the First Amendment requiring a commercial speaker to prove its words "board certified" are not "inherently misleading"? Does the speaker bear the burden of proving that the speech is not inherently "misleading?" Must the speaker bear such a burden by passing a four part test involving these standards: "(1) whether the speech is devoid of intrinsic meaning, (2) the possibilities for deception, (3) whether experience has proved that in fact such advertising is subject to abuse, and (4) the ability of the intended audience to evaluate the claims made" before the speech is entitled to First Amendment protection? In other words, are the words "board certified," which Peel v. Illinois held to be merely "potentially misleading," presumed to be not entitled to First Amendment protection until the words "board certified" pass a four part test to distinguish the "inherently misleading" from the potentially misleading?

PARTIES

The Petitioner is the American Academy of Pain Management, a non-profit California Corporation. The Respondent is Ronald Joseph in his official capacity as the Executive Director of the Medical Board of California and not personally. Ronald Joseph will be denominated "the Medical Board of California" throughout this petition for a writ of certiorari. The Petitioner has no parent company or wholly owned subsidiary.

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OPINION BELOW

This case is not officially reported. The opinion is in the appendix and is unofficially reported at 1998 Westlaw 709459.

CONCISE STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). As to Rule 10 (a), the Ninth Circuit Court of Appeals' decision conflicts with decisions of other Courts of Appeals in the Second, Fifth and Eleventh Circuits, other decisions of the Ninth Circuit, and conflicts with a decision of the California Supreme Court. The basis for jurisdiction in the Court below was the United States Constitution Article III §2, 28 U.S.C. 1331, 1292(a)(1) and 42 U.S.C. 1983.

CONSTITUTION AND STATUTES

The Constitutional provisions, statutes and regulations considered are the following: The First Amendment of the Constitution of the United States, California Business and Professions Code § 651, and Title 16 California Code of Regulations § 1363.5.

STATEMENT OF THE CASE

The American Academy of Pain Management (AAPM) is a multidisiciplinary association of health care professionals including medical doctors and many other disciplines devoted to the study, treatment and amelioration of chronic pain. The AAPM, the oldest and largest multidisciplinary pain management credentialing association in the world, certifies persons as specialists in multidisciplinary pain management who meet stringent standards and pass a psychometrically valid test. The

District Court denied a motion for preliminary injunction to stay the enforcement of an advertising statute which prohibited the use of the words "board certified," "certified," and "board eligible" by anyone except persons who met specified standards similar to a version of the American Board of Medical Specialties (ABMS) standards composed by the California Medical Board. The ABMS is a voluntary non-government, non-profit organization, similar in that regard to Petitioner. The California Medical Board does not certify or license medical specialists. All California licensed doctors may lawfully practice, specialize in, and advertise any specialty including pain management. The District Court ruled "inherently misleading" the advertisement of a certification of any board which did not have standards approved by the Medical Board of California. The Court made this finding at a preliminary hearing on the petition of the American Academy of Pain Management for a preliminary injunction temporarily staying, until after the time of trial, the enforcement of the Statute prohibiting an advertisement using the words "board certified," "certified," and "board eligible." The effect of this rule is the classification of material which is truthful and verifiable or only "potentially misleading" as "inherently misleading." The Court of Appeals affirmed this finding and ordered, that before any advertisement is treated as protected by the First Amendment, the Court must decide if it is inherently misleading by applying a new four part test which it specified is made up of these considerations: (1) whether the speech restricted is devoid of intrinsic meaning, (2) the possibilities for deception, (3) whether experience has proved that in fact such advertising is subject to abuse, and (4) the ability of the intended audience to evaluate the claims made. The Court of Appeals decision does not mention the Peel case.

REASONS FOR GRANTING PETITION

In Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed. 2d 83 (1990), the Court found "board certified" or "certified" potentially misleading, not inherently misleading. Peel distinguished misleading speech and "potentially misleading speech." The Peel Court found that the remedy for "potentially misleading speech" is more disclosure or the use of a disclaimer but not an absolute prohibition on the use of the terms. The Ninth Circuit ruled the words "board certified" were, in effect, "inherently misleading" unless shown by the speaker to be "potentially misleading." This Ninth Circuit opinion introduces a new subjective test which contradicts the Peel decision, and embraces the kind of paternalism the Supreme Court repeatedly cautions against; therefore, the American Academy of Pain Management files this petition for writ of certiorari. This new subjective preliminary test rejects the alternative of the Peel decision for a "disclaimer" or a "further disclosure." This new subjective test categorizes "potentially misleading" commercial speech as "inherently misleading" until proven otherwise and preliminarily strips the words "board certified," "board eligible" or "certified" of all constitutional protection. This ruling also impermissibly switches the burden of proof from the state to the speaker.

This new test announced by the Ninth Circuit is as follows: whether the words "board certified" are protected by the First Amendment is determined by considering four factors: (1) is the speech devoid of "intrinsic meaning," (2) the "possibilities for deception," (3) whether "experience has proved that in fact such advertising is subject to abuse," and (4) the ability of the intended audience to evaluate the claims made. This test makes a cause of prohibition of truthful speech the

"concern for the possibility of deception."

The Ninth Circuit ignores the prohibition against a ban of "potentially misleading speech."

This new subjective test is used by the Ninth Circuit to determine the first stage of the Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed2d 341 (1980), i.e., whether the speech concerns a lawful activity and whether the speech is misleading.

The "possibility of deception" does not justify a ban on advertisements of potentially misleading information if a cure can be found with the remedy of more disclosure:

> "...States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive."
> In re RMJ 455 US 191, 203, 102 S.Ct. 929, 937, 71 L.Ed2d 64 (1981).

The Court has discussed the "remedy of more disclosure rather than a ban," Bates v. Arizona at 433 U.S. 350, 375 97 S.Ct. 2691, 2704, 53 L.Ed2d 810 (1977), Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748, 770,96 S.Ct, 1817, 1829, 80 L.Ed.2d 346 (1975): Zauderer v. Ohio 471 US 626, 649, 105 S.Ct. 2265, 2280-81, 85 L.Ed.2d 652 (1985). The Court found the "concern for the possibility of deception" insufficient to overcome the constitutional presumption favoring disclosure over concealment. Peel at 486 US 91, 110 S.Ct 2281, 2293 110 L.Ed 2d 83 (1990).

"The party seeking to uphold a restriction on commercial speech carries the burden of justifying it," Edenfield v. Fane, 507 U.S. 761, 770, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993), quoted in Ibanez v. Florida 512 U.S. 136, 142, 114 S.Ct. 2084, 2088, 129 L.Ed.2d. 118 (1994). The Ninth Circuit's new preliminary test shifts the burden to the speaker and away from the state by requiring the speaker to prove its speech is only "potentially misleading," before considering First Amendment protection.

The Court in Ibanez rejected Florida's argument that in view of Ibanez' potentially misleading advertisement, Florida could enact a statute short of an absolute ban in order to prevent deception or confusion.

> "...[T]he Board's concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment,"
> Peel Ibid. at U.S. 111, 110 S.Ct., at 2293", Ibanez at U.S. 144, S.Ct. 2089, L.Ed.2d 128.

This Ninth Circuit ruling ignores the established rules protecting commercial speech,

> "...[W]here...truthful and nonmisleading expression will be snared along with fraudulent or deceptive commercial speech, the State must satisfy the remainder of the Central Hudson test by demonstrating that its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end."

Edenfield v. Fane 507 U.S. 761, 768-769, 113 S.Ct. 1792, 1798, 123 L.Ed.2d 543.

The Ninth Circuit ignored the Peel teachings cautioning against bans on speech: "disclosure of relevant truthful information is more likely to make a positive contribution to decision making than is concealment of such information," Peel at 2292 citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748, 770, 96 S.Ct 1817,1829, 80 L.Ed.2d 346 (1975). This new subjective test ignores the United States Supreme Court late First Amendment teachings

> "...[W]e conclude that a State Legislature does not have the broad discretion to suppress truthful, non-misleading information for paternalistic purposes that the Posadas majority was willing to tolerate. As we explained in Virginia Pharmacy Board, '[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.'"
> 44 Liquormart v. Rhode Island 517 U.S. 484, 497,116 S.Ct. 1495, 1511-12, 134 L.Ed2d 711 (1996).

Respect for free flow of consumer information and skepticism of paternalistic manipulation of market information increasingly guides the commercial speech decisions, see footnote 2 of the Liquormart concurring opinion of Justice Thomas, Ibid 1517.[1]

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[1] FN2. See Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 96-97, 97 S.Ct. 1614, 1620, 52 L.Ed.2d 155 (1977); Bates v. State

The Ninth Circuit confirmed the District Court's denial of an application for preliminary injunction against enforcement of a statute and regulation which prohibited the use of the words "board certified," "certified," and "board eligible." It found those words inherently misleading simply because a California statute and a resulting regulation prohibited the use of the terms "board certified," "certified," and "board eligible" without reference to the validity, objectivity and verifiability of the standards of the association. The District Court cited no

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Bar of Ariz., 433 U.S. 350, 364-365, 368-369, 374-375, 376-377, 97 S.Ct. 2691, 2699-2700, 2701, 2704, 2705, 53 L.Ed.2d 810 (1977); Friedman v. Rogers, 440 U.S. 1, 8-9, 99 S.Ct. 887, 893-894, 59 L.Ed.2d 100 (1979); id., at 23-24, 99 S.Ct., at 901 (Blackmun, J., for two Justices, concurring in part and dissenting in part); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557, 561-562, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980); id. at 566, n. 9, 100 S.Ct., at 2351, n. 9; id., at 575, 100 S.Ct., at 2356 (Blackmun, J., joined by Brennan, J., concurring in judgment); id., at 581, 100 S.Ct., at 2359 (STEVENS, J., also joined by Brennan, J., concurring in judgment); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 79, 103 S.Ct. 2875, 2887, 77 L.Ed.2d 469 (1983) (REHNQUIST, J., for two Justices, concurring in judgment); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 646, 105 S.Ct. 2265, 2279, 85 L.Ed.2d 652 (1985); Posadas de Puerto Rico Associates v. Tourism Co. of P. R., 478 U.S. 328, 350-351, 358, 106 S.Ct. 2968, 2982, 92 L.Ed.2d 266 (1986) (Brennan, J., for three Justices, dissenting); Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 421-422, n. 17, 113 S.Ct. 1505, 1512, n. 17, 123 L.Ed.2d 99 (1993); id., at 432, 113 S.Ct., at 1518 (Blackmun, J., concurring); Edenfield v. Fane, 507 U.S. 761, 767, 770, 113 S.Ct. 1792, 1798, 1800, 123 L.Ed.2d 543 (1993); United States v. Edge Broadcasting Co., 509 U.S. 418, 437-439, and nn. 1, 3, 4, 113 S.Ct. 2696, 2709, and nn. 1, 3, 4, 125 L.Ed.2d 345 (1993) (STEVENS, J., for two Justices, dissenting); Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136, ——, 114 S.Ct. 2084, 2088-2089, 129 L.Ed.2d 118 (1994); Rubin v. Coors Brewing Co., 514 U.S. 476, ——, 115 S.Ct. 1585, 1589, 131 L.Ed.2d 532 (1995); id., at ——, ——, 115 S.Ct., at 1594-1595, 1597 (STEVENS, J., concurring in judgment); Florida Bar v. Went For It, Inc., 515 U.S. 618, ——, ——, 115 S.Ct. 2371, 2383-2384, 2385-2386, 132 L.Ed.2d 541 (1995) (KENNEDY, J., for four Justices, dissenting).

Supreme Court cases for this restriction. It cited and followed Kale v. South Carolina, 301 SC 277, 391 S.E.2d 573 (1990), which case held if a statute restricts the use of words by statute, e.g., "board certified" or "hospital," any other usage of the words is "inherently misleading" and stripped of all First Amendment protection. Kale was decided before the Peel decision. The District Court ruled if the standards of the certifying association are not those defined by the statute, the words are "inherently misleading" even though the statement of "board eligible," "certification," or "board certification" is truthful, verifiable, and valid. The Ninth Circuit confirmed this ruling, but it ignored the Kale case. The Ninth Circuit defined the new four part test, repeated above, which it prescribed to be used to identify "inherently misleading" commercial speech and distinguish the "potentially misleading."

Because the Peel Court has already found the words "board certified" entitled to First Amendment protection, the Academy filed this petition. The American Academy of Pain Management submits the proper test for this speech is, at a minimum, the full four part test of Central Hudson. The new test ordered by the Ninth Circuit tends to paternalism and subjectivism. There seems no possible reason to avoid the Central Hudson test especially with words already defined by the United States Supreme Court as only "potentially misleading."

The Medical Board of California argued in the Court of Appeals that the purpose of its law restricting the use of "board certified," "board eligible," and "certified" is to protect the public from misleading advertisements. The Court of Appeals and the District Court did not consider the alternatives of further disclosure, for example, requiring identification of the subject matter of the certification and the name of the certifying board. The Medical Board defends this ban on speech arguing

that the State may screen certifying organizations and associations by establishing standards, and that any certifying association with standards that do not meet the State's selected standards is, by the State's definition "inherently misleading." Once a certifying board is so identified as "inherently misleading" there is no First Amendment protection and thus no need of further proof that the speech is either misleading, potentially misleading or inherently misleading. In short, this statutory definition ends the judicial proceeding. The advertisement is statutorily classified as "inherently misleading". Under this interpretation, there is no need of a trial on the merits under the Central Hudson tests, no need for a trial on the merits to decide if the words are only "potentially misleading," no need to consider a further disclosure or a disclaimer. This ruling eviscerates the First Amendment protection.

The Medical Board of California argues that where it has chosen a standard there is no need to require disclaimers or additional disclosure. The Medical Board ignores the Peel alternatives of more disclosure or a disclaimer: "...disclosure of relevant truthful information is more likely to make a positive contribution to decision making than is concealment," Peel at 2292 and "the constitutional presumption favoring disclosure over concealment," Peel at 2293. The Medical Board's argument focuses on Peel footnote 11 which mentions the ABMS, an example of "board certification" by twenty-three medical specialty boards with varying standards. The Medical Board argues that since the standards of the ABMS are meritorious, the state may ban advertising by all other certifying boards which do not have those selected standards or equivalent standards as defined by the Medical Board. The Medical Board of California reasons it may keep the public in the dark by prohibiting the use of the words "board certified," "certi-

fied," and "board eligible" by other valid, legitimate boards. Other boards not meeting these particular and voluntary nongovernmental restricted standards may be treated as "inherently misleading" without reference to the verifiability, objectivity, and validity of their standards, according to this Medical Board argument and the logic adopted by the Ninth Circuit Court of Appeals.

The Peel Court held that truthful statements of certification could not be absolutely banned if more disclosure or a disclaimer were added to potentially misleading statements.

> "To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty. In re R.M.J., 455 U.S., at 201-203, 102 S.Ct., at 936-938. ...A State may not, however, completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA."
> Peel v. Attorney Registration and Disciplinary Commission of Illinois 486 US 91, at 110, 110 S.Ct 2281, 2292-2293 110 L.Ed 2d 83 (1990).

The rule of more disclosure rather than less was announced in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.

> "There is...an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them...But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U.S., at 770, 96 S.Ct., at 1829. [quoting from Virginia]
> Linmark v. Willingboro 431 U.S. 85,97, 97 S.Ct. 1614,1620, 52 L.Ed.2d 155 (1977).

The rule "more disclosure rather than a ban" consistently governed commercial advertising decisions of the United States Supreme Court with perhaps one exception. That case is Friedman v. Rogers 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979) which held that Texas could prohibit the use of trade names by optometrists, particularly in view of the considerable history in Texas of deception and abuse worked upon the consuming public through the use of trade names. The Medical Board of California has no history of abuse of the words "board certified" by the American Academy of Pain Management. There has been no trial at which a history of abuse of the words "board certified," "certified," and "board eligible" has been proven. There is no proof that the problems of the words "board certified" cannot be solved with more disclosure, e.g., state the

identity of the certifying board and specify the subject of the certification. For example: Dr. Ronald Luke, Diplomate in Multidisciplinary Pain Management, American Academy of Pain Management.

Friedman was decided in 1979, a decade before Peel used the solution of more disclosure, rather than a ban. The Friedman decision specifically discussed that there was no need to consider further disclosure,

> "...there is no First Amendment rule, comparable to the limitation on § 5, requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication,"
> Friedman v. Rogers 440 U.S. 1, 11 99 S.Ct. 887, 896, 59 L.Ed.2d 100 (1979).

Since the Peel decision, more disclosure or a disclaimer, rather than a ban is clearly required. Friedman involved the use of trade names, not descriptions of advanced learning, training, and experience in a particular area of knowledge.

The new four part test to distinguish the "inherently misleading" from the "potentially misleading" was used by the Ninth Circuit in a previous case, Lundgren v. Association of National Advertisers 44 F3d 726 (1994). That decision cited Friedman v. Rogers as authority for the first prong of its test, "whether the words are devoid of intrinsic meaning," Lundgren at 731.

The words "board certified" have intrinsic meaning. The Peel Court discusses the words and finds the public understands the uses of the words "certificate" and "board certified," and, in any case, the rule of more

disclosure should apply, at 103-104, S.Ct. at 2289. The California Medical Board's regulation recognizes the words "board certified" have a known definition, but the Board attempts by the regulation to restrict the meaning of the words "board certified."

The Ninth Circuit and the District Court impermissibly combined the commercial speech categories "potentially misleading" and "inherently misleading." Once the categories were combined, the Courts use the new four part test from Lundgren which resulted in a finding that the words "board certified" are "inherently misleading," at least for the purposes of a preliminary injunction. It is important to note that the District Court granted an earlier temporary restraining order, but after it considered the new Lundgren test the District Court found the words inherently misleading solely because of the statutory limitation on the use of the words "board certified" and "certified." This new subjective test eliminates First Amendment protection. This finding contradicts the Peel Court holding that the words were only "potentially misleading."

The question, "Is this speech misleading?" is inevitably subjective and elusive. The term "misleading" is subject to as many different interpretations as there are people. Almost any statement is misleading if given a sufficiently mannered reading. The solution is more disclosure. This has been a consistent ruling since the Supreme Court first sustained a lawyer's price advertising, Bates v. State Bar of Arizona., 433 U.S. 350, 375, 97 S.Ct. 2691, 2704, 53 L.Ed.2d 810 (1977). This California Supreme Court followed the more disclosure rule in Moore v. California State Bd. of Accountancy, 2 Cal.4th 999, 1023, 9 Cal.Rptr.2d 358, 373, 831 P2d 838 (1992). It required more disclosure or the use of a disclaimer rather than prohibiting the words "accounting" or "accountant" by a person who was not a "certified

accountant." The Moore Court followed the Peel teaching.

"Verifiability, validity, truthfulness" become irrelevant if statutes define words such as "board certified." The government is not and should not be in the business of controlling or defining words and phrases used by the public. "Board certified" has a generally understood meaning which the Peel Court discusses: There has been no finding that any person has associated certification with governmental action—state or federal—and there is no basis for belief that Petitioner's representation generally would be so construed.

> "We are satisfied that the consuming public understands that licenses—to drive cars, to operate radio stations, to sell liquor—are issued by governmental authorities and that a host of certificates—to commend job performance, to convey an educational degree, to commemorate a solo flight or a hole in one—are issued by private organizations. The dictionary definition of "certificate," from which the Illinois Supreme Court quoted only excerpts, comports with this common understanding:
> "[A] document issued by a school, a state agency, or a professional organization certifying that one has satisfactorily completed a course of studies, has passed a qualifying examination, or has attained professional standing in a given field and may officially practice or hold a position in that field." Webster's Third New International Dictionary 367 (1986 ed.)"
> Peel v. Attorney Registration and Disciplinary Com'n of Illinois, 496 U.S.

91, at 103, 110 S.Ct. 2281, at 2289, 110 L.Ed.2d 83 (1990).

The Ninth Circuit Court of Appeals decision not only contradicts Peel, the Court of Appeals decision demotes the Central Hudson tests to a secondary position. The words approved of in Peel must now go through a preliminary test and then, and only then, will the words go through the Central Hudson tests. The District Court has already ruled those words are "inherently misleading," because the statute has defined the words "inherently misleading" as meeting the ABMS equivalent standards. The American Academy of Pain Management does not meet all of those numerous private standards, though it has valid, verifiable and objective standards. The Court of Appeals and the District Court opinions decided this case with no thought of the remedy of more disclosure.

The American Academy of Pain Management should be entitled to an injunction as a matter of usual course in cases where a fundamental right, i.e. speech, is denied even for a short time. The District Court demonstrated this when it granted a temporary restraining order based on the case of Lydo Enterprises v. Las Vegas 745 F2d 1214 (9th Cir. 1984) (citing Elrod v. Burns 427 U.S. 347, 373, 96 S.Ct. 2673, 2689-90, 49 L.Ed2d 547 (1976)), which held the loss of fundamental freedoms for even minimal periods of time is irreparable injury. Peel is not even discussed or cited in the Court of Appeals decision, which suggest it was not even considered. The Peel case holds that the words "board certified" are at worst only "potentially misleading." Clearly, the preliminary injunction should have been granted, and the Court of Appeals should have reversed the District Court's use of the Kale standard and should have reversed the denial of the temporary injunction.

The Court of Appeals decision conflicts with Peel by eliminating the alternative of additional disclosure and/or providing disclaimers when using the words "board certified," "board eligible," or "certified." The Ninth Circuit's refusal to grant the preliminary injuction conflicts with the Second Circuit's order enjoining the New York State Liquor Authority from banning a label showing a frog giving a well known, insulting finger gesture, Bad Frog Brewery, Inc. v. New York State Liquor Authority, 134 F3d 87, 101-102 (1998). This refusal to grant the preliminary injunction presumes the speech is "inherently misleading" until proven "potentially misleading".

The words "inherently misleading" have been considered by the Supreme Court in a number of recent cases. In these cases the Supreme Court has not approved a ban on speech: Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118; Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 54; Peel v. Attorney Registration and Disciplinary Com'n of Illinois, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83; Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475; Lowe v. S.E.C., 472 U.S. 181, 105 S.Ct. 2557, 86 L..Ed.2d 130 92; Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 US 626, 649, 105 S.Ct. 2265, 2280-81 (1985).

The Court has restricted commercial speech which is subject to manipulation or undue influence, Ohralik v. Ohio 436 US 447, 98 S.Ct. 1912, 56 L.Ed. 444 (1978). Ohralik, a lawyer, solicited a hospitalized, potential client, face to face and in person. The words "board certified" have no manipulative use on the public or the professional audience.

Florida Bar v. Went For It All 515 U.S. 618, 115

S.Ct. 2371, 132 L.Ed.2d 541 (1995) found reasonable a prohibition soliciting relatives of airline crash victims within 30 days of the death of a relative whose death was to be the subject of professional representation. This decision upheld a State Bar rule intended to protect victims' families' privacy during a time of mourning.

The Ninth Circuit Court of Appeals decision is inconsistent with decisions of other Circuit Courts. The Eleventh Circuit followed the rule of more disclosure rather than a ban similar to the ruling in Peel, see Abramson v. Gonzalez, 949 F. 2d 1567, 1576 (11th Cir. 1992). In a very recent District Court decision, a similar statute to that of California which applied to dentists was found unconstitutional by a court in the Northern District of Florida, Bogner v. Cook et. al. which is not published but can be found at Lexis 1998 number 15432. The Sixth Circuit found unconstitutional a Kentucky statute prohibiting dentists from advertisement of specialization. Parker v. Kentucky Board of Dentistry, 818 F 2d 504, at 509-511 (6th Circuit 1987). There are conflicts in the Circuits' decisions. These conflicts deserve clarification by the United States Supreme Court.

The Ninth Circuit's Lundgren decision was limited to terms describing recyclable goods. That decision was based upon a finding that the words describing recycling had no established use or definite meaning. In contrast, the words "board certified" and "certified" have a recognized meaning as recited in the Peel decision. Any ambiguity in the use of the terms "board certified" can be remedied through more disclosure and or disclaimers. The statute § 651 of the California Business and Profession Code and the regulation Title 16 California Code of Regulations 1363.5 prohibit advertising or statements using the words "board certified," "certified," or "board eligible." The California statute criminalizes speech. The California statute permits criminal

prosecution of a medical doctor for truthful speech. Any medical doctor licensed by California may specialize as the doctor decides, any licensed doctor may advertise a specialty, and may limit his or her practice to that specialty. The statute prohibits and criminalizes advertisement of lawful behavior, that is, board certification. Many of the standards are only remotely related to the validity of the certifying association. The standards include requirements for the composition of the Board of Directors, require the specialty of the certifying boards not be a single modality, require the certifying association to limit its primary purpose to specialization. The regulatory standards will prohibit a statement of the fact of valid board certification, because the regulatory standards supposedly defined what is required for validity, and any other standard of validity is conclusively presumed invalid or "inherently misleading."

The Ninth Circuit ignored, in this decision, the test by which Peel distinguishes the inherently misleading and the potentially misleading, which is more disclosure rather than a ban. The Ninth Circuit effectively threatens all potentially misleading speech with classification as "inherently misleading." This new test conflicts with other opinions of the Ninth Circuit in the case of United Reporting Company v. California Highway Patrol, 146 F 3d 1133 (1998), and Valley Broadcasting Co. v. United States, 107 F.3d 1328 (1997) which required application of the Central Hudson and the Liquormart guidelines for prohibitions of commercial speech. The Ninth Circuit opinion conflicts with other Circuits' and Supreme Court decisions.

This Ninth Circuit decision shifts the burden from the state to the speaker. This case is the opportunity to correct a judicial and legislative misunderstanding which denies First Amendment rights, and denies the public needed information concerning the relief of

chronic pain.

The writ should be granted to correct this contradiction of the Peel ruling.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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FILED

SEP 30 1998

CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN ACADEMY OF PAIN MANAGEMENT, a California nonprofit corporation, Plaintiff-Appellant, and ARNOLD FOX, M.D.; B. ELLIOT COLE, M.D., Plaintiffs, v. RONALD JOSEPH, in his official capacity as Executive Director of the Medical Board of California, Defendant-Appellee.	No. 98-15357 D.C. No. CV-96-02108-LKK MEMORANDUM[1]

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted September 16, 1998
San Francisco, California

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Filed

Before: T.G. NELSON, THOMAS and SILVERMAN, Circuit Judges.

The American Academy of Pain Management ("AAPM"), Arnold Fox, M.D., and B. Elliot Cole, M.D., appeal the district court's denial of their application for preliminary injunction against the Medical Board of California and its Executive Director, Ronald Joseph, in his official capacity. Because the parties are familiar with the facts of this case and its procedural history, we need not restate it here.

To succeed on a motion for a preliminary injunction, the movant must show either (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. Hale v. Dep't of Energy, 806 F.2d 910,914 (9th Cir. 1986). We review a district court's denial of an application for a preliminary injunction for an abuse of discretion. Id.

The district court did not abuse its discretion in concluding that the plaintiffs had failed to make the requisite showing to merit the entry of a preliminary injunction.

Appellants argue that Cal. Bus. & Prof. Code § 651 (h) (5), and its corresponding regulations, are unconstitutional. In denying the application for a preliminary injunction, the district court concluded that "there were serious questions regarding whether plaintiffs' speech is protected by the First Amendment." We agree.

The Supreme Court has articulated a four-part test under which the constitutionality of government regulations of commercial speech should be analyzed:

At the outset, we must determine whether

> the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

The district court found that the expression at issue in this case is "inherently misleading" and therefore unprotected by the First Amendment. Determination of whether speech is "inherently misleading" under the first stage of a Central Hudson analysis is made by analysis of four factors: (1) whether the speech restricted is devoid of intrinsic meaning, (2) the possibilities for deception, (3) whether experience has proved that in fact such advertising is subject to abuse, and (4) the ability of the intended audience to evaluate the claims made. See Association of National Advertisers v. Lungren, 44 F.3d 726,731 (9th Cir. 1994).

The district court did not expressly consider these factors, but determined that a preliminary injunction was not warranted because the phrase was inherently misleading. Based on the evidence in the record, the district court did not abuse its discretion in concluding that plaintiffs had not established a likelihood of prevailing on the merits of this question. At oral argument both parties indicated that they

wished to submit further evidence on this question, as well as on the other Central Hudson factors. That, of course, is the proper procedure upon remand when the court can consider the new tendered evidence specifically in the context of Lungren. If the district court determines after application of the Lungren factors that the phrase "board certified" is only potentially misleading, then it must complete the Central Hudson analysis. Of course, the court in its discretion may also elect to complete Central Hudson analysis as an alternative holding, or in the interest of a complete foundation for appeal.

Nonetheless, the parties' desire to submit additional information and the existence of potentially disputed issues of fact is not a reason for reversing the district court's preliminary injunction order concerning the First Amendment issues.

The district court also did not abuse its discretion in determining that the plaintiffs were unlikely to prevail on their due process claims for the reasons cited in the district court order.

For these reasons, we affirm the denial of the preliminary injunction request.

AFFIRMED

FILED

FEB 26 1998

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AMERICAN ACADEMY OF PAIN MANAGEMENT, a California Non Profit Corporation; ARNOLD FOX, M.D., an individual; and B. ELLIOTT COLE, M.D., an individual,

NO. CIV. S-96-2108 LKK/GGH

Plaintiffs,

v.

ORDER

RONALD JOSEPH, in his official capacity as the Executive Director of the MEDICAL BOARD OF CALIFORNIA, and not personally,

Defendant.

_____ /

This matter comes before the court on plaintiff's motion for reconsideration of the order denying plaintiffs' motion for a preliminary injunction. Pursuant to Local Rule 78-230(h), the court disposes of the matter upon the pleadings and papers on file herein.

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I.
PROCEDURAL HISTORY

The American Academy of Pain Management ("the Academy") applied to the Medical Board of California for recognition as a certifying board under Title 16 California Code of Regulations § 1363.5. On February 7, 1997, the Medical Board of California denied the Academy's request. Thereafter, the Academy filed this suit to enjoin Cal. Bus. & Prof. Code § 651 (h) (5), which prohibits physicians from advertising board certification unless the certifying board is recognized.

After an expedited hearing, this court granted a temporary restraining order enjoining enforcement of the challenged provision. See Order filed February 28, 1997. Upon fuller hearing, the court denied plaintiffs' motion for a preliminary injunction. See Order filed May 23, 1997.[1] Plaintiffs seek reconsideration and "clarification" of that order.[2]

II.
STANDARDS FOR MOTIONS TO RECONSIDER

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[1] At oral argument on the hearing for a preliminary injunction, the court asked plaintiffs whether they wished to convert the matter to a motion for a permanent injunction. Plaintiffs indicated that they did not.

[2] Plaintiffs ask that enforcement of the statute be stayed pending appeal of this court's order denying the preliminary injunction and ask that all previously scheduled dates be vacated pending appeal. Plaintiffs have not yet filed a notice of appeal but, given that they have filed this motion for reconsideration, the time for filing an appeal does not begin to run until the entry of the order disposing of this motion. See Fed. R. App. P. 4.

"Under the 'law of the case' doctrine a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (citing Thomas v. Bible, 983 F.2d 153, 154 (9th Cir.), cert. denied, 508 U.S. 951 (1993)). Although motions to reconsider are directed to the sound discretion of the court, see Kern-Tulare Water Dist. v. City of Bakersfield, 634 F. Supp 656, 665 (E.D. Cal. 1986), aff'd in part and rev'd in part on other grounds, 824 F.2d 514 (9th Cir. 1987), cert. denied, 486 U.S. 1015 (1988), considerations of judicial economy weigh heavily in the process. Thus, Local Rule 78-230(k) requires that a party seeking reconsideration of a district court's order must brief the "new or different facts or circumstances [which] were not shown upon such prior motion, or what other grounds exist for the motion." Generally speaking, before reconsideration may be granted there must be a change in the controlling law, facts or other circumstances, the need to correct a clear error, or the need to prevent manifest injustice. Alexander, 106 F.3d at 876.

As with motions to alter or amend a judgement pursuant to Fed. R. Civ. P. 59(a), motions to reconsider are not vehicles permitting the unsuccessful party to "rehash" arguments previously presented, see Costello v. United States Government, 765 F. Supp. 1003, 1009 (C.D. Cal. 1991). Nor is a motion to reconsider justified on the basis of new evidence which could have been discovered prior to the court's ruling. Fay Corp. v. BAT Holdings One, Inc., 651 F. Supp. 307, 309

(W.D. Wash. 1987), aff'd 896 F.2d 1227 (9th Cir. 1990). Finally, "after thoughts" or "shifting of ground" do not constitute an appropriate basis for reconsideration. Id. These relatively restrictive standards "reflect [] district courts' concern for preserving dwindling resources and promoting judicial efficiency." Costello, 765 F. Supp. at 1009.

III

ANALYSIS

A. WHETHER RECONSIDERATION IS JUSTIFIED

Plaintiffs utterly fail to demonstrate that any new or different circumstances warrant reconsideration of this court's order denying the motion for a preliminary injunction. Plaintiffs contend that the standards for reconsideration are satisfied because this court's opinion set forth a "new rule of constitutional law." See Pl. Supp. Mem. at 2. Although the court disagrees that its holding that advertising board certification by the Academy is inherently misleading is a "new rule of constitutional law," even if this were the case it could not provide grounds for reconsideration of the court's order. The standards for reconsideration contemplate that reconsideration is appropriate, inter alia, when the law controlling the decision changes after the court issues its decision. No such circumstance is presented here.[3] Never the less, the court responds to the plaintiffs' requests for clarification raised in this motion.

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[3]The fact that the Sixth and Eleventh Circuit may be read to have reached contrary conclusions when faced with similar questions of law also does not demonstrate that reconsideration is

B. DUE PROCESS

Plaintiffs contend that the court's order relative to procedural due process is inconsistent because the court held that plaintiffs' First Amendment claim is ripe, since the Medical Board of California has denied the Academy's application for equivalency as a certifying board, but that plaintiffs cannot contend that they have been denied procedural due process because further process is available under state law.

A First Amendment claim may be brought in federal court pursuant to 42 U.S.C. § 1983 without exhausting remedies available under state law. See Patsy v. Bd. of Regents, 457 U.S. 496 (1982). On the other hand, plaintiffs cannot raise a claim that they have been denied the process due them under state law without first availing themselves of available state law procedures since the essence of the claim is that no procedures are provided. See, e.g., Daniels v. Williams, 474 U.S. 327, 338-39 (1986) (Stevens, J., concurring) (noting that a procedural due process claim "is fundamentally different," because in such a claim "it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty without due process of law -- without adequate procedures.").

Plaintiffs further contend that the court erred

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appropriate. See Parker v. Commonwealth of Kentucky, Bd. of Dentistry, 818 F. 2d 504 (6th Cir. 1987) (striking down law which prohibited individuals who did not meet state standards from holding themselves out as psychologists); Abramson v. Gonzalez, 949 F.2d 1576-77 (11th Cir. 1992) (striking down statute which barred dentists from advertising that they were 'specialists' in orthodontics).

in concluding that an administrative writ of mandamus pursuant to Cal. Civ. Proc. Code § 1094.5 was available, since such writs are only available when a hearing requiring that evidence be taken is required by law. See, e.g., Keeler v. Superior Court, 46 Cal.2d 596 (1956) (holding that "[a] writ of administrative mandate is available only where by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal."). Under California law, however, "where there is no specific provision for a hearing, a hearing requirement is to be implied absent a contrary intent expressed in the provisions creating the right to appeal." Chavez v. Civil Service Comm'n, 86 Cal.App.3d 324, 332 (1978); see also Eureka Teachers Assn. v. Board of Educ., 199 Cal.App.3d 353 (1988). Plaintiffs fail to demonstrate that the statute expresses an intent to foreclose the right to a hearing. Moreover, in the case at bar, a hearing was actually held and evidence submitted. Accordingly, plaintiffs fail to establish a likelihood of success on their claim for a violation of the Due Process Clause.

C. PRIOR RESTRAINT

Plaintiffs contend that this court should reconsider its decision denying the motion for a preliminary injunction because the court failed to consider the argument that the certification scheme acts as a prior restraint. As I now explain, this contention does not provide a basis for reconsideration of the court's prior order.

It is well established that a licensing scheme is impermissible if it allows officials unfettered discretion to impose prior restraints on speech. See

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969). In Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557, 570 n.13 (1980), however, the Court held that "commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it." The Court noted that "a prescreening arrangement can pass constitutional muster if it includes adequate procedural safeguards." Id.

In the case at bar, it is undisputed that the speech at issue constitutes commercial speech. Moreover, even assuming that the prior restraint doctrine were applied to the licensing scheme at issue here, this scheme contains adequate procedural safeguards. The regulations at issue set forth "narrow, objective and definite standards," Shuttlesworth, 394 U.S. at 150-51, for determining whether a certifying board will be approved and this decision is not left to the unfettered discretion of the California Medical Board. Thus, plaintiffs fail to demonstrate that the regulations at issue here pose an impermissible prior restraint and this contention does not provide any basis for reconsideration of the court's prior order.

D. CHANGED FACTUAL CIRCUMSTANCES

At the time of the court's ruling on plaintiffs' motion for a preliminary injunction, plaintiffs submitted no evidence which created a factual dispute regarding the validity of the findings of the Medical Board of California. Plaintiffs contend, without submitting new evidence, that the practices of the Academy have changed since the time the Academy applied to the Medical Board of California.

Plaintiffs contend that the previously

submitted declaration of Richard S. Weiner establishes that, in the future, the Academy will only certify those who pass the exam.[4] On this basis, plaintiffs ask the court to find a likelihood of success on the claim that the Academy consistently applies its standards and that advertising certification by the Academy is therefore not inherently misleading. Even assuming arguendo that on the basis of this evidence the court was able to find that the Academy did have objective and consistently applied standards, albeit lower than the standards required by the State, this would not alter the court's conclusion.

In Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n, 447 U.S. 557 (1980), the Supreme Court explicated an analytical framework for determining the validity of restrictions on commercial speech which concerns lawful activity and is not misleading. The Supreme Court held that regulations that impinge on truthful commercial speech must serve a substantial governmental interest, directly advance that interest and reach no further than necessary to accomplish that objective. Id. at 566. Subsequently, the Court clarified that what is required is a reasonable fit that "employs not necessarily the least restrictive means, but . . . a means narrowly tailored to achieve the desired

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[4] The court has reviewed the declaration of Richard S. Weiner filed February 11, 1997 but is unable to locate any statement in the document averring that in the future the testing requirement will be consistently applied. The attached brochures, see Weiner Decl., Exh. N and O, do provide that passing an examination is required but this statement in the brochure does not provide any evidence disputing other evidence that only half of those certified have actually taken the exam.

objective." Board of Trustees of State University v. Fox, 492 U.S. 469 (1989).

In Peel v. Attorney Discipline Committee, 496 U.S. 91, 109 (1990), the Supreme Court suggested that the State has the power to give content to a term such as "board certified" by establishing required standards. Id. at 110 (noting that "a State might consider screening certifying organizations").[5] In the case at bar, this court concluded that, because the Academy failed to meet the standards set by the State, advertising by its members is inherently misleading and the court therefore did not reach the other Central Hudson factors. On this motion, plaintiffs fail to demonstrate that the exam is consistently applied, but even if plaintiffs could do so they have not provided any rationale for reconsideration of the court's decision.[6]

E. INJUNCTION PENDING APPEAL

Finally, plaintiffs ask the court to enjoin enforcement of the statute pending appeal. For the same reasons that the court found that the balance of hardships did not tip in plaintiffs' favor and a preliminary injunction should not issue, the court declines to stay enforcement of the statute

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[5] The regulation at issue in Peel, in contrast to the regulation under consideration here, banned advertising of certification under any circumstances regardless of the standards of the certifying board.

[6] In supplemental papers, plaintiffs contend that a report by Dr. Miller recommending to the Medical Board of California that an application by another certifying board be rejected was suppressed by defendants during discovery. There is no evidence that plaintiffs sought this evidence prior to the hearing on the motion for a preliminary injunction; regardless, this evidence does not provide any basis for reconsidering the court's conclusion that plaintiffs do not demonstrate a likelihood of success on the merits.

pending appeal. Plaintiffs may, however, request that the Circuit Court do so.

IV.

ORDER

For all the above reasons, the court makes the following ORDERS:

1. Plaintiffs' motion for reconsideration is DENIED;

2. All previously set dates are VACATED and will be reset upon disposition of the appeal of this court's order denying a preliminary injunction; and

3. The above captioned case is STAYED pending further order of the court. The parties are directed to notify the court within ten (10) days after the Circuit Court issues a final order.

IT IS SO ORDERED

DATED: February 24, 1998

s/Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

FILED

MAY 23 1997

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AMERICAN ACADEMY OF PAIN MANAGEMENT, a California Non Profit Corporation; ARNOLD FOX, M.D., an individual; and B. ELLIOT COLE, M.D., an individual,

NO. CIV. S-96-2108 LKK/GGH

Plaintiffs,

v.

ORDER

RONALD JOSEPH, in his official capacity as the Executive Director of the MEDICAL BOARD OF CALIFORNIA, and not personally,

Defendant.

_____/

This matter is before me on plaintiffs' motion for a preliminary injunction. Pursuant to Local Rule 78-230 (h), the court disposes of the matter upon the pleadings and papers on file herein, and upon oral arguments by the parties at hearing on May 1, 1997.

I.

THE FACTS[1]

In 1990, the California Legislature passed SB 2036 (McCorquodale)[2] amending the California Business & Professions Code to prohibit physicians and surgeons from advertising board certification unless the certifying board is recognized by the Medical Board of California.[3] Cal. Bus. & Prof. Code § 651 (h) (5). The Medical Board of California is a unit of the Department of Consumer Affairs and is a statewide agency authorized to license physicians and surgeons to practice in California. See Cal. Bus. & Prof. Code § 101 (b).

A subsequent amendment to the Business

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[1] All factual conclusions made here in connection with determining the propriety of issuing a preliminary injunction are, of course, subject to revision at the time of trial. In any event, unless otherwise noted, the facts herein are undisputed.

[2] The Assembly committee on Health's report relative to SB 2036 indicates that the bill seeks to remedy the problem that, "Currently a physician who takes a weekend curse can advertise themselves as 'board certified' in that specialty. There is no quality control, and some patients have been severely hurt. They do nor realize that sometimes a framed 'specialty' certification could be the result of a two-day course." See Weiner Decl., Exh. 1.

The same report indicates that, "We have approximately a 25-inch stack of articles, references, videos where patients have [been] fooled by a framed diploma/'board certification' and seriously harmed by a physician performing a procedure that they were not certified to do." Id.

[3] Cal. Bus & Prof Code § 651 (h) (5) (B) provides that a physician may advertise board certification where the certifying board is (i) a member of the American Board of Medical Specialities; (ii) a board or association with equivalent requirements; or (iii) a board or association with Accreditation Council for Graduate Medical Education approved postgraduate training providing complete training in the specialty or subspecialty.

and Professions Code in 1992, AB 2180 (Felando) expanded the scope of section 651 (h) (5) (B) to allow the Medical Board of California to promulgate regulations governing certification of physicians and surgeons by multidisciplinary boards or associations. Pursuant to Cal Bus. & Prof. Code § 651 (h) (B) (5), the Medical Board of California promulgated regulations found at Title 16 California Code of Regulations § 1363.5.[4] These regulations define the requirements a board must meet in order to be considered equivalent to the American Board of Medical Specialities ("ABMS") and thereby permit its physician members to advertise board certification.

Although the regulations covering board certification granted by multidisciplinary specialty boards were effective February 28, 1994, see Cal. Code Regs. tit. 16 § 1363.5 (b) (3), the regulations provide that the specialty board has three years from the effective date to demonstrate its equivalency to ABMS boards. Cal. Code Regs. tit. 16 § 1363.5 (8) (C).[5] If it fails to do so, thereafter its physician members may not advertise certification by that board. This three year period expired on February 28, 1997.

Plaintiffs are the American Academy of Pain

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[4] The 1990 statute specifically limited the Medical Board's jurisdiction to matters covered by Chapter 5 of the Medical Practice Act, Cal. Bus. & Prof Code § 2000 et seq., relating to physicians and surgeons.

[5] The regulations also provide for a further one-year extension if the Division of Licensing of the Medical Board of California determines that a board is making a good faith effort toward ABMS equivalency. Neither party contends that such a finding has been made with regard to the Academy.

Management ("the Academy"), a non profit organization incorporated in 1988 for the purpose of issuing credentials to multidisciplinary pain practitioners, and two physicians who advertise their board certification from the Academy.[6] On April 5, 1996, the Academy applied to the Medical Board of California for recognition on the equivalency track.[7] In response, the Medical Board of California employed Dr. William Hamilton as a consultant to evaluate the Academy's application. Janie Cordray of the Medical Board also evaluated the Academy's application.

The Medical Board of California denied the Academy's application on February 7, 1997. It supported its rejection of plaintiff's application on the basis of a variety of findings and conclusions. With respect to testing, it noted that the Academy gives a two-hour test consisting of one hundred multiple choice questions,[8] Cordray Decl. at ¶ 6, whereas under the regulation, in order to be equivalent a board must offer a sixteen hour test. Cal. Code Regs. tit. 16 § 1363.5 (b) (10).[9] The

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[6] Prior to the effective date of the statute, the Academy sued in state court seeking to enjoin application of the statute. Apparently, that suit was dismissed for failure to exhaust administrative remedies since plaintiffs had not applied for approval as an equivalent board.

[7] At least two other boards not affiliated with the ABMS have been approved in this manner, the Board of Facial, Plastic and Reconstructive Surgeons, and the American Board of Pain Medicine. See Cordray Decl. Opp. TRO at ¶ 15; Nelson Dec. at ¶ 7.

[8] The test was developed by a national testing organization and defendants do not contend that the test does not measure skills relevant to patients in pain.

Medical Board of California also concluded that of the 5,000 pain practitioners who were certified at the time of application, only approximately 1,000 have taken the test. See Hamilton Decl., Exh. B at 2.

With regard to training, the Medical Board found that the Academy does not currently require any formal postgraduate training. Courdray Decl. at ¶4. It also concluded that the Academy's proposal for future training programs was deficient because no clinical training was contemplated.

With regard to the structure of the organization, the Medical Board concluded that the Academy's governing body was not stable and independent since it does not have staggered term limits of not more than six years, and because no provision is made for outside input into the selection of board members. See Cordray Decl. at ¶ 6.

Shortly thereafter, and just before the statute prohibiting the Academy's physician members from advertising their board certification took effect, plaintiffs filed the present suit and sought a temporary restraining order.[10]

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[9] Plaintiffs contend that the American Board of Pain Medicine, whose application was approved by the Medical Board of California, permits physicians to take an eight hour test with eight hours of credit for ABMS certification. Even if the regulation is applied with this flexibility, this neither demonstrates that the Academy's two hour test suffices, nor that the Medical Board of California is biased against the Academy.

[10] Based on a finding that serious legal questions were presented and that the balance of hardships tipped in plaintiffs' favor, the court granted plaintiffs' motion for a temporary restraining order after an expedited hearing held one day before the statute was to take effect.

II.

ANALYSIS

A. LIKELIHOOD OF SUCCESS ON THE MERITS

The court begins by noting that it finds no evidence in the record refuting the conclusions reached by the Medical Board of California regarding whether the Academy's standards satisfy the requirements set out in the regulations. Thus, the issue becomes whether, given those findings, plaintiffs can succeed on a claim that the statute or its implementing regulations violate the First Amendment's protection of commercial speech.

I. OVERBREADTH

Ordinarily, a plaintiff may challenge a statute's constitutionality only as it applies to the plaintiff's conduct. Put another way, a plaintiff may not challenge a statute's potential unconstitutionality as applied to others. See Broadrick v. Oklahoma, 413 U.S. 601 (1973).

The First Amendment overbreadth doctrine represents a departure from this traditional rule. In the First Amendment context, courts have permitted attacks on overly broad statutes without requiring that plaintiffs making the attack demonstrate that their conduct was itself protected by the First Amendment. See, e.g., Gooding v. Wilson, 405 U.S. 518 (1972).

Since the rationale for the overbreadth doctrine is that an overly broad statute might chill protected speech, the Supreme Court has held that the justification applies "weakly, if at all, in the ordinary commercial context." Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977). Accordingly, the Court has declined to apply the doctrine in the

context of professional advertising. Id.

Since the overbreadth doctrine does not apply to the claims at bar, plaintiffs must demonstrate that their own speech falls within the protection of the First Amendment, and cannot raise asserted constitutional defects in the statute's application to other speakers. As I now explain, there are serious questions regarding whether plaintiffs' speech is protected by the First Amendment.

II. COMMERCIAL SPEECH

Both parties agree that the statute at issue regulates only commercial speech.[11] It is well-settled that the state may completely ban commercial speech that is either actually or inherently misleading. See Edenfield v. Fane, 507 U.S. 761, 768-70, 123 L.Ed.2d 543 (1993). Under current doctrine, if the Academy does not have "objective and consistently applied standards," see Peel v. Attorney Discipline Committee, 496 U.S. 91, 109 (1990), the advertisements by a physician claiming board certification from the group may be condemned as actually misleading.

From the record, it appears that the Academy does not have objective standards

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[11] The state's suggestion that the statue is aimed at the harm caused by incompetent physicians has given the court pause. As the Supreme Court recently explained "[i]t is the State's interest in protecting consumers from 'commercial harms' that provided the typical reason why commercial speech can be subject to greater governmental regulations than noncommercial speech." 44 Liquormart, Inc. v. Rhode Island, _U.S._, 116 S. Ct. 1495 (1996). Accordingly, to the extent the state's purpose in regulating the speech of physicians is aimed at achieving "an end unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." Id.

requiring training. Nonetheless, since defendants have not challenged the legitimacy of the Academy's two-hour test the court concludes, for purposes of the present motion, that the test provided some objective standards for certification, despite the fact that these standards are below those required by the state.

While the court concludes that there are standards for certification, from all that appears in the record, only one in five of those certified has taken the exam. This fact raises serious questions as to whether the Academy applies those standards consistently.

Plaintiffs contend that this lack of testing is a product of "grandfathering" various members. Both sides appear to agree that it is traditional for boards to permit some recognition of the founders of a new discipline by grandfathering. Without pausing to examine when and to what degree grandfathering is permissible for First Amendment purposes, plaintiffs' argument falters in the absence of a strong showing that the testing requirement is presently being consistently applied. In the absence of such testing the court cannot find consistently applied standards within the meaning of Peel, and in the absence of such standards it is appropriate to conclude that plaintiffs' speech is misleading and therefore not entitled to First Amendment protection.

Moreover, even assuming that the Academy were able to demonstrate that its testing requirement is consistently applied, there are other questions regarding whether it is inherently misleading for plaintiffs' physician members to advertise board certification. As noted, in Peel the

Supreme Court held that states can require those who advertise certification to "demonstrate that such certification is available to all [practitioners] who meet objective and consistently applied standards relevant to practice in a particular area." Peel, 496 U.S. at 109. Once the state has set such standards, advertising certification from a board that does not meet such standards is inherently misleading. See, e.g., Kale v. So. Carolina Dep't of Health & Environ. Control, 301 S.C. 277 (1990) (where statute defined term "hospital," advertising "chiropractic hospital" by facility not meeting definition is deceptive and ban does not violate First Amendment); see also Steelman v. Okl. State Bd. of Medical Licensure, 824 P.2d 1142 (1992) (holding that state had the power to define requirements for board certification and could, consistent with the First Amendment, bar physician from advertising himself as such without meeting state requirements); Parmley v. Missouri Dental Bd., 719 S.W.2d 745, 751 n.7 (1986) (distinguishing case where disclaimer requirement had been struck down because state had not implemented a specialty or certification system).

Where commercial speech is inherently misleading, the State can absolutely ban it. Edenfield, 507 U.S. at 768. State regulation of the term "board certification," implemented by reasonable standards, poses no danger that "truthful and nonmisleading expression will be snared along with fraudulent or deceptive speech." Edenfield, 123 L.Ed.2d at 554.

Plaintiff's reliance on Peel is understandable, but misguided. The instant matter is quite different. Unlike the mater at bar, in Peel

the state had not set minimum standards that a certifying board was required to meet; accordingly, advertising board certification was at most only potentially misleading. Moreover, the ban in Peel was properly characterized as an absolute ban because attorneys were never permitted to advertise certification. Advertising certification even from a bona fide group, however high the standards of the certifying organization, was barred. The statute at issue here, in contrast, permits members of a certifying organization to advertise so long as the board adheres to state specified minimum standards.[12]

In sum, whether because plaintiffs have not demonstrated that they have objective and consistently applied standards, or because advertising certification without meeting state standards is inherently misleading, the court concludes that applying this statute to plaintiffs appears to comport with the First Amendment and therefore plaintiffs demonstrate little likelihood of success on this claim.

B. VAGUENESS

A statute is unconstitutionally vague where it does not give adequate notice to people of ordinary intelligence concerning the conduct it proscribes. See United States v. Smith, 795 F.2d 841, 847 n.4 (9th Cir. 1986). The degree of vagueness the

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[12] The court need not consider whether the state could impose standards so restrictive that they amounted to a ban on truthful advertising, thus raising First Amendment questions. The standards in issue here pose no such danger. Rather, they constitute a reasonable accommodation of the need for regulation of the medical profession on the one hand, and the requisites of the First Amendment as applied to commercial speech, on the other.

Constitution tolerate depends upon the nature of the enactment. Planned Parenthood v. Arizona, 718 F.2d 938, 948 (9th Cir. 1983). Courts are less tolerant of vagueness in laws imposing criminal rather that civil penalties, or implicating free speech concerns. Id. at 948.

The statute at bar is subject to more stringent examination both because violators potentially face a jail sentence and because the statute raises free speech concerns. Nonetheless, for the reasons explained below, I cannot agree that the statute does not put citizens on notice of the conduct prohibited.

The regulations set forth detailed and objective requirements that an organization must meet before it will be approved as a certifying organization by the Medical Board of California.[13] Moreover, a certifying organization has a ready means of ascertaining whether advertising by its members will be subject to the ban since the organization can apply for approval from the Medical Board of California. In sum, because the regulations specifically define when a board is equivalent to an ABMS board, the court finds no basis for concluding that the regulations are unconstitutionally vague.

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[13] The regulations require that a certifying board give a test of a certain length, have training requirements meeting certain criteria, and meet requirements relative to the stability and independence of the board.

C. DUE PROCESS[14]

Plaintiffs contend that there were irregularities in the process by which their application for equivalency was denied, effectively denying them due process relative to their application.

Under the Due Process Clause two issues arise, whether the interest asserted is one protected by the Fourteenth Amendment, and, if so, what is the process due. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). The court assumes that the rights derived from the First Amendment protecting commercial speech constitute a liberty interest protected by the Due Process Clause. Accordingly, I turn to the issue of the process due. Plaintiffs claims take two forms, first, they allege that they were subjected to a biased review and, second, that the procedures adopted by the Medical Board of California were applied improperly.

Plaintiffs' argument that the Medical Board of California's licensing procedure as a whole improperly subjects plaintiffs to regulation by interested persons appears to have little likelihood of success on the merits. See e.g., Friedman v. Rogers, 440 U.S. 1, 18-19 (1979) (although optometrist had a constitutional right to a fair and impartial hearing there was no constitutional right to be regulated by a board sympathetic to the commercial, rather than "professional," practice of

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[14] Plaintiffs' complaint does not plead a violation of the Due Process Clause. In their moving papers, however, plaintiffs make contentions which appear to implicate the Due Process Clause. In an abundance of caution, the court addresses those contentions as if they fall within the four corners of the complaint.

optometry). Nor is there a better chance of success relative to the second argument.

Fundamentally, the Due Process Clause provides that the right to an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." See Fuentes v. Shevin, 407 U.S. 67, 80 (1972). Without doubt, on their face, the administrative process and judicial review provisions provide due process. Thus, plaintiffs, claim challenges these procedural provisions "as applied" to their application for equivalency. As I now explain, that claim is not ripe.

Under California law, plaintiffs are entitled to raise specific challenges to the actions of the Medical Board of California. See Cal. Civ. Proc. Code § 1094.5 (allowing for petition for writ of administrative mandate). Ordinarily, where a plaintiff fails to exhaust a state provided system of redress, a challenge to that process as constitutionally deficient will not lie since such a claim is not ripe. See Mathews v. Eldridge, 424 U.S. 319, 329 n.10 (1976). Until such time as the process is exhausted adversely to the plaintiff, it cannot be said that the plaintiff was denied due process. Id.[15]

Accordingly, it appears that plaintiffs cannot successfully raise a Due Process challenge to the evaluation of their application without first challenging the adequacy of the process through available state channels.

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[15] It is of course true that a plaintiff need not exhaust state administrative remedies before bringing a § 1983 action. Patsy v. Bd. of Regents of State of Florida, 457 U.S. 496 (1982). That rule, however, has no application to an "as applied" due process claim.

For all the reasons noted above, plaintiffs have demonstrated little chance of succeeding on the merits. Nonetheless, I briefly turn to the balance of hardship.

D. BALANCE OF HARDSHIPS

On the eve of the statute's effective date, this court granted a temporary restraining order after concluding that serious legal questions were presented and that the balance of hardships tipped in plaintiffs' favor. I now conclude that the decision overstated the harm to plaintiff and failed to give proper weight to the state's interest in having its statute effectuated.

The fact that, absent an injunction, the Academy's physician members who continue advertising their board certification could be subject to civil and criminal penalties must be taken seriously. However, in light of the court's conclusion that under the circumstances such advertising would be misleading, that consequence cannot be viewed as a significant hardship.

The harm to the Academy itself is limited to a prohibition on advertising by its physician members only. Plaintiffs certify individuals including nurses, counselors, priests and social workers. None of these individuals are subject to the statute, and the Academy is not barred from continuing to certify practitioners in those fields.

Finally, the court notes that the right of a state to have its lawful statute govern conduct within the state is a public value which is entitled to weight.

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III.

CONCLUSION

For all the above reasons, the court cannot find that the balance of hardship tips in plaintiffs' favor. Indeed, given the likely finding that the advertisement of board certification by the Academy's physician members is under the circumstances, misleading, the balance tips to the state.

After weighing the likelihood of success and the balance of hardships, the court concludes that even a limited preliminary injunction barring the state from enforcing this statute should not issue. According, the temporary restraining order is DISSOLVED and plaintiff's motion for a preliminary injunction is DENIED.

IT IS SO ORDERED.

DATED: May 21, 1997.

s/Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

FILED

FEB 28 1997

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AMERICAN ACADEMY OF PAIN MANAGEMENT, a California Non Profit Corporation; ARNOLD FOX, M.D., an individual; and B. ELLIOTT COLE, M.D., an individual,

NO. CIV. S-96-2108 LKK/GGH

Plaintiffs,

v. ORDER

RONALD JOSEPH, in his official capacity as the Executive Director of the MEDICAL BOARD OF CALIFORNIA, and not personally,

Defendant.

_____ /

This matter comes before the court on plaintiffs' motion for a temporary restraining order. Plaintiffs may meet their burden by demonstrating that sufficiently serious questions going to the merits demonstrate "fair ground for litigation," and that the balance of hardships tips decidedly in their favor. Friends of the Earth v. United States Navy, 841 F.2d 927, 933 (9th Cir. 1988).

After hearing, the court concludes that the

constitutional questions are sufficiently serious that there exist fair grounds for litigation although this is by no means a conclusion that on the present state of the record plaintiffs are likely to prevail.

The balance of hardship also tips strongly in plaintiffs' favor. If California Business & Professions Code § 651 (h) (5) is enforced against plaintiffs they are threatened with criminal as well as civil sanctions. See Cal. Bus. & Prof. Code § 652. Harm to plaintiffs' reputation also appears inevitable. Moreover, "any loss of First Amendment rights, even briefly, can constitute irreparable injury." See Lydo Enterprises, Inc. v. City of Las Vegas, 745 F.2d 1211, 1213 (9th Cir. 1984). Given that the State has countenanced the present state of affairs for three years after the enactment of the statute at issue, it cannot assert that it suffers any hardship.

Finally, while preventing deceptive advertising is undoubtedly in the public interest, the public also has an interest in the free flow of commercial information and thus this consideration does not favor either party. In sum, there exist fair grounds for litigation and the balance of hardships tips strongly in plaintiffs' favor.

Accordingly, the court makes the following ORDERS:

1. Plaintiffs' motion for a temporary restraining order is GRANTED. Any enforcement against plaintiffs of California Business & Professions Code § 651 (h) (5) or its implementing regulations, through California Business & Professions Code § 652 or otherwise, shall be enjoined through May 1, 1997;

2. Plaintiffs shall post a bond in the amount

of one hundred dollars ($100.00) to the Clerk of the Court in support of this temporary restraining order;

3. A hearing on plaintiffs' motion for a preliminary injunction SET for May 1, 1997 at 9:15 a.m. in Courtroom No. 1. The parties are directed to file any additional briefs or affidavits not later than April 14, 1997; and

4. If live testimony is required the court will notify the parties not later than seven (7) days prior to the hearing.

IT IS SO ORDERED.

DATED: February 26, 1997.

s/Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

RICHARD A. BORGNER, D.D.S.,
and THE AMERICAN ACADEMY OF
IMPLANT DENTISTRY,

Plaintiffs,

v. 4:97cv93-WS

DOUG COOK, IN HIS OFFICIAL
CAPACITY AS DIRECTOR, STATE
OF FLORIDA, AGENCY FOR
HEALTHCARE ADMINISTRATION,
and FAUSTINO GARCIA, D.M.D.,
SOLOMON G. BROTMAN, D.D.S.,
PHIL J. LEVINE, D.D.S., CHARLES
L. ROSS, D.D.S., EDWARD R. SCOTT,
II, D.M.D., CAROL E. WILLIAMSON,
D.M.D., JACQUELINE B. McDONOUGH,
R.D.H., IRENE J. STAVROS, HILDA
H. GENCO, MARY L. McDONALD, IN
THEIR OFFICIAL CAPACITIES, AS
MEMBERS OF THE FLORIDA BOARD OF
DENTISTRY,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

In this action for declaratory and injunctive

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Rimes, W5(2), COB 1998

relief, the plaintiffs, Richard Borgner, D.D.S., and the American Academy of Implant Dentistry (collectively "Plaintiffs"), ask the court to declare unconstitutional, and to enjoin the defendants from enforcing, section 466.0282, Florida Statutes. Such section prohibits Florida licensed dentists from advertising membership in, or specialty recognition by, an accrediting organization that is not recognized or accredited by the American Dental Association. Plaintiffs contend that section 466.0282 violated the First Amendment to the United States Constitution, specifically the First Amendment right to freedom of commercial speech.

Before the court at this time is Plaintiffs' motion for summary judgement (doc. 49). The defendants have responded (docs. 61-63) to the motion, and the parties have been advised (doc. 77) that the motion would be taken under advisement as of a date certain.

I.

The American Academy of Implant Dentistry ("AAID") is a national dental organization whose member dentist may earn credentials ("Fellow" and "Associate Fellow") in the field of implant dentistry upon satisfying certain experiential, educational, and testing requirements. At the time this case was filed, AAID had approximately one hundred seventy-two (172) dentist-members who practiced dentistry in the State of Florida.

AAID sponsors a national certifying board, the American Board of Oral Implantology/Implant Dentistry ("ABOI/ID"). The ABOI/ID issues the credential of "Diplomate" upon a dentist's fulfillment of certain educational, experiential and examination requirements. When this suit was filed, approximately one hundred twenty-five dentists nationwide had attained the status of "Diplomate" of the ABOI/ID.

Richard Borgner ("Borgner") is a Florida licensed dentist who concentrates his practice in the field of implant dentistry. As a credentialed member of AAID, Borgner has advertised in the past, and wants to continue advertising in the future, (1) his membership in AAID; (2) his status as "Fellow" of AAID; and (3) his status as "Diplomate" of ABOI/ID.

In August, 1994, the Florida Board of Dentistry (the "Board") issued a final order on a petition filed by Frank R. Recker, D.D.S., for a declaratory statement as to the ability of AAID members to advertise their status as fellow of the AAID and diplomates of the ABOI/ID. Doc. 1, Ex. D. In its order, BOD 94-01DS, the Board reported as a finding of fact that "the AAID and the ABOI/ID are bona fide organizations that credential dentists in the area of implant dentistry." Id. at 2. The Board also reported as a conclusion of law that the Florida statutes and/or administrative rules then in effect permitted a dentist to advertise his or her "Fellow" status in the AAID as well as his or her "Diplomate" status in the ABOI/ID so long as the advertisement did not imply to the public that the advertising dentist had obtained specialty status. Id.

Effective October 1, 1996, the Florida Legislature nullified the Board's 1994 order, BOD 94-01DS, when it amended Florida law to prohibit dentists in Florida from advertising membership in, or specialty recognition by, organizations not recognized or accredited by the American Dental Association. Fla. Stat., § 466.0282(1) (1996) The Florida Legislature explained as follows:

> The purpose of this section is to prevent a dentist from advertising membership in an organization which may be perceived by the public as recognizing or

> accrediting specialization in an area of dentistry that is not recognized or accredited by the American Dental Association....The Legislature finds that dental consumers rely on recognition by the American Dental Association as proof that an area of dentistry is recognized as a legitimate dental specialty by other dentists and that the accrediting or recognizing organization of that specialty is bona fide. The Legislature also finds not only that the American Dental Association...has the administrative staff and financial resources necessary to investigate and thoroughly evaluate whether an accrediting or recognizing organization is capable of accurately determining whether an area of dentistry is uniquely defined and educationally disciplined so as to meet a substantial public need for clinical treatment, but also that this accreditation process is the least restrictive means available to ensure that consumers are not misled about whether an area of dentistry is a legitimate specialty.

Fla. Stat. § 466.0282(2) (1996).

The special areas of dental practice currently recognized by the American Dental Association ("ADA") are: dental public health, endodontics, oral and maxillofacial pathology, oral and maxillofacial surgery, orthodontics and dentofacial orthopedics, pediatric dentistry, periodontics, and prosthodontics. Implant dentistry has not been approved as a dental specialty by the ADA, nor has AAID or ABOI/ID

received ADA recognition as a dental specialty accrediting organization. Consequently, the effect of section 466.0282(1)--as interpreted by the Florida Board of Dentistry--is to altogether prohibit Florida dentists from advertising their membership in and/or specialty recognition by AAID and ABOI/ID.

Plantiffs contend that, by placing a categorical ban on all advertising of specialty credentials by dentists whose credentials are not ADA-approved, section 466.0282 blocks the general public's access to truthful and accurate commercial information. Plaintiffs argue such a blockage, or ban, is inconsistent with the free speech guarantees of the First Amendment of the United States Constitution and is contrary to decisions of the United States Supreme Court.

II.

In Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976), the United States Supreme Court firmly established that commercial speech enjoys the protection of the First Amendment. The Court was careful to explain, however, that the protections are limited to truthful, non-misleading commercial speech. Commercial speech or advertising which is false, deceptive, or misleading is not so protected and may be prohibited entirely. Virginia Bd. of Pharmacy, 425 U.S. at 771-772.

The Court acknowledged that state regulations of advertising by physicians and lawyers may be necessary because physicians and lawyers "render professional services of almost infinite variety and nature, with the consequent enhances possibility for confusion and deception." Virginia Bd. of Pharmacy, 425 U.S. at 773 n.25. Nonetheless, in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53

L.Ed.2d 810 (1977), the Court extended the commercial speech protections announced in Virginia Board of Pharmacy to the regulation of advertising by lawyers. Later, writing for a unanimous court in In re R.M.J., 455 U.S. 191, 102 S. CT. 929, 71 L.ED.2D 64 (1982), Justice Powell summarized the standards applicable to claims involving attorney advertising as follows:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. Bur the States may not place absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive...Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

In re R.M.J., 455 U.S. at 203.

In Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91, 110 S. Ct. 2281, 110 L.Ed.2d 83 (1990), the Court held that Gary Peel's use of the designation "Certified Civil Trial Specialist by the

National Board of Trial Advocacy" was neither actually nor inherently misleading. The Court explained that "[a] claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success...but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice." Peel, 496 U.S. at 101. Indeed, as noted by the Court, certification was not the only verifiable fact in Peel's case; the predicate requirements for certification by the National Board of Trial Advocacy ("NBTA") were verifiable facts as well. Furthermore, there was no suggestion that the NBTA issued certificates to lawyers indiscriminately, and there was no evidence that a potential client or person was in fact misled or deceived by Peel's advertisement. Absent such evidence, the Court concluded that Peel's advertisement of his certification was not misleading or deceptive on its face.

The Court acknowledged that statements of "certification" as a "specialist," even though truthful, may not be fully understood by some readers. The Court nevertheless concluded that "concern for the possibility of deception was not sufficient to rebut the constitutional presumption favoring disclosure over concealment." Peel, 496 U.S. at 111 (emphasis added). The Court, therefore, held that, under the First Amendment, the State of Illinois could not justify a prophylactic ban against all advertisement of Peel's specialty certification on the basis that the information was potentially misleading.

The Court later extended the lessons in Peel to a case involving a lawyer, Silvia Ibanez ("Ibanez"), who advertised her credentials as a Certified Public

Accountant ("CPA") and a Certified Financial Planner ("CFP").[1] Ibanez v. Florida Bd. of Accountancy, 512 U.S. 136, 114 S. Ct. 2084, 129 L.Ed.2d 118 (1994). Ibanez was reprimanded by the Florida Board of Accountancy (the "Board of Accountancy") for engaging in "false, deceptive, and misleading" advertising. As to Ibanez's use of the CFP designation, the Board of Accountancy argued that any designation using the term "certified" to refer to a certifying organization other than the Board of Accountancy itself or an organization approved by the Board of Accountancy "inherently mislead[s] the public into believing that state approval and recognition exists." Ibanez, 129 L.Ed.2d at 125. The Court rejected the Board of Accountancy's argument, noting that such argument was "difficult to maintain in light of Peel." Ibanez, 129 L.Ed.2d at 127. The Court also rejected the Board of Accountancy's argument that use of the CFP designation was potentially misleading, entitling the Board of Accountancy to enact measures short of a total ban to prevent deception or confusion. The Court explained that if the " 'protections afforded commercial speech are to retain their force'...we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' "Ibanez, 129 L.Ed.2d at 128 (cites omitted).

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[1] A private organization, the Certified Financial Planner Board of Standards, authorizes use of the trademarked designation "Certified Financial Planner" to persons who satisfy certain core educational requirements, who receive a passing score on a certification examination, who complete a planning-related work experience requirement, who agree to abide by the CFP Code of Ethics and Professional Responsibility, and who complete an annual continuing education requirement.

The Board of Accountancy having failed to point to any real--as opposed to hypothetical--harm, the Court concluded that the Board of Accountancy's "concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." Ibanez, 129 L.Ed.2d at 127-128 (quoting Peel, 496 U.S. at 111); see also Edenfield v. Fane, 507 U.S. 761, 113 S. Ct. 1792, 123 L.Ed.2d 543 (1993 (striking down Florida ban on CPA solicitation where Board of Accountancy presented neither studies suggesting that personal solicitation created the dangers the Board of Accountancy claimed to fear nor anecdotal evidence validating the Board of Accountancy's suppositions); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648-649, 105 S. Ct. 2265, 85 L.Ed.2d 652 (1985) striking down restrictions on attorney advertising where "State's arguments amount to little more than unsupported assertions" without "evidence or authority of any kind").

While a number of courts, including the Supreme Court, have considered the matter of advertising by attorneys and accountants, it appears that few courts have addressed the issue of advertising by dentists. Indeed, after searching both state and federal databases, this court found only one such case, namely Parker v. Commonwealth of Kentucky, Board of Dentistry, 818 F.2d 504 (6th Cir. 1987). In Parker, the Sixth Circuit determined that "[a]lthough there are distinctions between the professions of dentistry and law, we do not detect that the description of services performed by dentists is any more inherently or potentially misleading than those performed by lawyers." Parker, 818 F.2d at 510. The Sixth Circuit accordingly applied traditional First

Amendment commercial speech analysis, as articulated in the attorney advertising cases, in the context of dental advertising.

The Court in Parker considered a Kentucky statute that prohibited general dental practitioners from holding themselves out to the public as specialists, or as being "especially qualified," in a particular branch of dentistry. As a general dental practitioner, Stanley Parker ("Parker") was permitted under Kentucky law to perform services in all recognized branches of dentistry, including orthodontia, but he was nevertheless prohibited from using the words "orthodontics," "braces," "brackets," and similar terms in advertising his services. When Parker in fact placed an advertisement in the Yellow Pages listing, as some of his services, "Orthodontics with Clear & Metal Brackets," and Orthodontics without Braces," the state Board of Dentistry instituted disciplinary proceedings against him. On appeal, the Board of Dentistry argued that Parker's use of such words as "orthodontics" and "braces" could actually or potentially mislead the general public into believing that he was a "specialist" in the area of orthodontics. The Sixth Circuit, however, found that Parker's advertisement--a truthful description of services that he was permitted under Kentucky law to perform--was not inherently misleading. While willing to assume that Parker's advertisement could be potentially misleading, the Sixth Circuit nonetheless concluded that Kentucky's out-right ban on the use of specific, non deceptive terms could not be justified under the Constitution or Supreme Court precedent.

Like the defendants in Peel, Ibanez, and Parker, the defendants in this case bear a heavy burden to justify the complete ban placed on certain aspects of

commercial speech, specifically on the advertisement of a dental practitioner's membership in AAID and credentials awarded by AAID and ABOI/ID. In shouldering their burden, the defendants may not rely on speculation and conjecture but must produce specific evidence to demonstrate that the harms they recite are real and substantial and that the ban "directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." Ibanez, 129 L.Ed.2d at 126. Plaintiffs suggest--and the court agrees--that, given their burden, the defendants have not produced sufficient evidence to survive Plaintiffs' motion for summary judgment.

III.

It is undisputed that Richard A. Borgner ("Borgner") is a credentialed member of the AAID who has been awarded the status of "Fellow" of AAID as well as the status of "Diplomate" of ABOI/ID. Like the credentials at issue in Peel and Ibanez, Borgner's credentials constitute verifiable facts, as do the predicate requirements for those credentials. The defendants nonetheless seek to distinguish this case from Peel and Ibanez.

The defendants first state that specialty certifications in dentistry "involve assertions of special expertise on the part of the dentist in scientific fields which are much more esoteric to the average lay consumer of dental services than terms such as 'certified trial lawyer' and 'certified financial planner' are to sophisticated consumers of legal and accounting services." Doc. 61 at 7. Record support for the defendants' conclusory statement, however, is nonexistent. The defendants have cited no studies and have produced no evidence to support their

suggestion that consumers of dental services--as opposed to consumers of legal and financial planning services--are more likely to be misled by secondary level certifications. Nor have they explained why, in considering the difference between consumers, they compare the "average lay" dental consumer to the "sophisticated" consumer of legal or financial planning services.

The defendants next suggest that, unlike the state respondents in Peel and Ibanez, the state defendants in this case have produced "anecdotal" evidence to support their argument that members of the public would be confused if Borgner were permitted to advertise his membership in, and credentialing by, non-ADA-approved organizations. This "anecdotal" evidence consists of the affidavits of (1) Robert T. Ferris, D.D.S., a diplomate of the American Board of Periodontology, a past chairperson of the Florida Board of Dentistry, the president-elect of the Florida Dental Association, and a past member of the ADA Council on Dental Education/Commission on Dental Accreditation ("ADA Council"); and (2) H. Fred Varn, a past Executive Director of the Florida Board of Dentistry.

As a past Executive Director of the Florida Board of Dentistry, Mr. Varn states in his affidavit that "it is his opinion and belief that a substantial portion of the consumers of dental services in Florida believe that dentists who hold themselves out to the public as 'specialists,' as being 'board certified,' or as limiting their practice to a particular type of practice have in fact obtained specialty certification from the State of Florida or a specialty organization approved by the State of Florida." Doc. 62, Ex. 2 at ¶ 10. The defendants admit, however, that they have no

empirical evidence to support Mr. Varn's opinion.

As a dental practitioner whose practice is limited to the ADA-approved specialty of periodontics, Dr. Ferris states in his affidavit that

> it is my opinion that confusion exists among dental consumers concerning the relation between legitimate dental specialties and other dental areas with which the consumer must deal, such as dental practice settings, dental methodologies, and generic areas of dental practice. These other areas should not be equated with dental specialties because they usually only deal with a technique or an instrument (implants, lasers, etc.) and not with a defined area of health care practice.

Doc. 62, Ex. 1 at ¶ 10. Again, the defendants have not come forward with any empirical evidence to support Dr. Ferris's opinion. They have produced not one bit of anecdotal evidence concerning Dr. Borgner's patients or potential patients, not one report of a complaint or inquiry about his services or his advertisements, not one report of any person's being deceived, misled, or confused by any dentist's AAID or ABOI/ID certifications, and not one document or study to support the proposition that dental consumers have been misled by any credential issued by any dental accrediting organization in any area of dentistry not recognized by the ADA as a specialty area of dentistry.

As a past member of the ADA Council, Dr. Ferris also states that AAID sought and was denied approval of implant dentistry as a recognized dental specialty from the ADA Council on at least one occasion. Dr. Ferris, a periodontist, says:

> [T]he ADA Council found that AAID failed to meet the Criterion of Recognition which states that the scope of a proposed new specialty cannot readily coincide with the scope of other recognized dental specialties. The ADA Council determined that AAID's proposed specialty in implant dentistry was already being provided adequately by other qualified dental practitioners such as Periodontists, Oral Surgeons, Prosthodontists, and General Dentists. Because these other specialists had been performing the techniques of implant dentistry with a high level of skill and had gained expertise in the performance of implant dentistry, the ADA Council determined that AAID does not meet this Criterion of Recognition requirement.

Doc. 62, Ex. 1 at ¶ 19. Dr. Ferris does not state that implant dentistry is an illegitimate or unrecognized area of dental practice. He does not state that dentists who are not ADA-recognized specialists are unqualified to perform implant dentistry. He does not state that AAID or ABOI/ID is a sham or that either organization awards certifications indiscriminately. In essence, Dr. Ferris says that AAID was denied ADA-recognition as a dental specialty credentialing organization largely because other qualified dental practitioners--including periodontists like himself--are "equally qualified and often more qualified to perform the same procedures as the dental practitioners AAID wishes to have certified as implant specialists." Doc. 62, Ex. 1 at ¶ 20.

The defendants have fallen woefully short of

convincing this court that dental consumers will be misled if Borgner is permitted to advertise both his membership in AAID as well as his credentialed status with AAID and ABOI/ID. While the defendants support their assertions with little more than speculation and conjecture about the possibility of deception in hypothetical cases, they provide no specific evidence that suggests, much less demonstrates, that Borgner's advertisement will create the danger of deception they claim to fear. Given a record devoid of the type of evidence needed for the defendants to survive constitutional review and to successfully rebut the presumption favoring disclosure over concealment, the court finds that Plaintiffs are entitled to summary judgement.

Accordingly, it is ORDERED:

1. Plaintiffs' motion for summary judgement (doc. 49) is GRANTED.

2. SECTION 466.0282 is DECLARED unconstitutional to the extent it prohibits Borgner from advertising his membership in AAID and his credentialed status in AAID and ABOI/ID, and the defendants are ENJOINED from enforcing section 466.0282 against Borgner for advertising his membership in AAID and his credentialed status in AAID and ABOI/ID.

3. The clerk is directed to enter judgement in Plaintiffs' favor, with costs taxed to the defendants.

DONE AND ORDERED this 16th day of July, 1998.

s/William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

CIV 31
(Rev 5/83) JUDGEMENT IN A CIVIL CASE

United States District Court	Northern District of Florida
Case Title: RICHARD A. BORGNER, D.D.S. and THE AMERICAN ACADEMY OF IMPLANT DENTISTRY, V. DOUG COOK, et al.,	Docket Number 4:97cv93-WS Name of Judge or Magistrate Judge WILLIAM STAFFORD
☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered it's verdict.	
X Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate judge) named above presiding. The issues have been tried or heard and a decision has been rendered.	
IT IS ORDERED AND ADJUDGED	
Plaintiff's motion for summary judgement is GRANTED. Judgement is entered in favor of the Plaintiff, with costs taxed to the Defendant's.	
ROBERT A. MOSSING, CLERK By Deputy Clerk: PAM KUMINKOSKI S/	July 17, 1998

ENTERED ON DOCKET JULY, 17, 1998 BY PK
(Rules 58 & 79(a) FRCP or 32(d)(1) & 55 FRCRP)
Copies mailed to: Marshall, Recker, Rimes, COB 1998

OFFICE OF CLERK
U.S. DISTRICT CT.
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California Business and Profession Code §651.

(a) It is unlawful for any person licensed under this division or under any initiative act referred to in this division to disseminate or cause to be disseminated, any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim, for the purpose of or likely to induce, directly or indirectly, the rendering of professional services or furnishing of products in connection with the professional practice or business for which he or she is licensed. A "public communication" as used in this section includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, book, or list or directory of healing arts practitioners.

(b) A false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which does any of the following:

(1) Contains a misrepresentation of fact.

(2) Is likely to mislead or deceive because of a failure to disclose material facts.

(3) Is intended or is likely to create false or unjustified expectations of favorable results.

(4) Relates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors.

(5) Contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

(c) Any price advertisement shall be exact, without the use of such phrases as "as low as," "and up," "lowest prices" or words or phrases of similar import. Any advertisement which refers to services, or costs for services, and which uses words of comparison must be based on verifiable data substantiating the comparison.

Any person so advertising shall be prepared to provide information sufficient to establish the accuracy of that comparison. Price advertising shall not be fraudulent, deceitful, or misleading, including statements or advertisements of bait, discount, premiums, gifts, or any statements of a similar nature. In connection with price advertising, the price for each product or service shall be clearly identifiable. The price advertised for products shall include charges for any related professional services, including dispensing and fitting services, unless the advertisement specifically and clearly indicates otherwise.

(d) Any person so licensed shall not compensate or give anything of value to a representative of the press, radio, television, or other communication medium in anticipation of, or in return for, professional publicity unless the fact of compensation is made known in that publicity.

(e) Any person so licensed may not use any professional card, professional announcement card, office sign, letterhead, telephone directory listing, medical list, medical directory listing, or a similar professional notice or device if it includes a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of subdivision (b).

(f) Any person so licensed who violates any provision of this section is guilty of a misdemeanor. A bona fide mistake of fact shall be a defense to this subdivision but only to this subdivision.

(g) Any violation of any provision of this section by a person so licensed shall constitute good cause for revocation or suspension of his or her license or other disciplinary action.

(h) Advertising by any person so licensed may include the following:

(1) A statement of the name of the practitioner.

(2) A statement of addresses and telephone numbers of the offices maintained by the practitioner.

(3) A statement of office hours regularly maintained by the practitioner.

(4) A statement of languages, other than English, fluently spoken by the practitioner or a person in the practitioner's office.

(5) (A) A statement that the practitioner is certified by a private or public board or agency or a statement that the practitioner limits his or her practice to specific fields. For the purposes of this section, the statement of a practitioner licensed under Chapter 4 (commencing with Section 1600) who limits his or her practice to a specific field or fields, shall only include a statement that he or she is certified or is eligible for certification by a private or public board or parent association recognized by that practitioner's licensing board. A statement of certification by a practitioner licensed under Chapter 7 (commencing with Section 3000) shall only include a statement that he or she is certified or eligible for certification by a private or public board or parent association recognized by that practitioner's licensing board.

(B) A physician and surgeon licensed under Chapter 5 (commencing with Section 2000) by the Medical Board of California may include a statement that he or she limits his or her practice to specific fields, but may only include a statement that he or she is certified or eligible for certification by a private or public board or parent association, including, but not limited to, a multidisciplinary board or association, if that board or association is (i) an American Board of Medical Specialties member board, (ii) a board or association with equivalent requirements approved by that

physician and surgeon's licensing board, or (iii) a board or association with an Accreditation Council for Graduate Medical Education approved postgraduate training program that provides complete training in that specialty or subspecialty. A physician and surgeon licensed under Chapter 5 (commencing with Section 2000) by the Medical Board of California who is certified by an organization other than a board or association referred to in clause (i), (ii), or (iii) shall not use the term "board certified" in reference to that certification.

For purposes of this subparagraph, a "multidisciplinary board or association" means an educational certifying body that has a psychometrically valid testing process, as determined by the Medical Board of California, for certifying medical doctors and other health care professionals that is based on the applicants' education, training, and experience.

For purposes of the term "board certified," as used in this subparagraph, the terms "board" and "association" means an organization that is an American Board of Medical Specialties member board, an organization with equivalent requirements approved by a physician and surgeon's licensing board, or an organization with an Accreditation Council for Graduate Medical Education approved postgraduate training program that provides complete training in a specialty or subspecialty.

The Medical Board of California shall adopt regulations to establish and collect a reasonable fee from each board or association applying for recognition pursuant to this subparagraph. The fee shall not exceed the cost of administering this subparagraph. Notwithstanding Section 2 of Chapter 1660 of the Statutes of 1990, this subparagraph shall become operative July 1, 1993. However, an administrative agency or accrediting organization may take any action contemplated by this

subparagraph relating to the establishment or approval of specialist requirements on and after January 1, 1991.

(6) A statement that the practitioner provides services under a specified private or public insurance plan or health care plan.

(7) A statement of names of schools and postgraduate clinical training programs from which the practitioner has graduated, together with the degrees received.

(8) A statement of publications authored by the practitioner.

(9) A statement of teaching positions currently or formerly held by the practitioner, together with pertinent dates.

(10) A statement of his or her affiliations with hospitals or clinics.

(11) A statement of the charges or fees for services or commodities offered by the practitioner.

(12) A statement that the practitioner regularly accepts installment payments of fees.

(13) Otherwise lawful images of a practitioner, his or her physical facilities, or of a commodity to be advertised.

(14) A statement of the manufacturer, designer, style, make, trade name, brand name, color, size, or type of commodities advertised.

(15) An advertisement of a registered dispensing optician may include statements in addition to those specified in paragraphs (1) to (15), inclusive, provided, that any statement shall not violate subdivision (a), (b), (c), or (e) of this section or any other section of this code.

(16) A statement, or statements, providing public health information encouraging preventative or corrective care.

(17) Any other item of factual information that is not false, fraudulent, misleading, or likely to deceive.

(i) Each of the healing arts boards and examining committees within Division 2 shall adopt appropriate regulations to enforce this section in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

Each of the healing arts boards and committees and examining committees within Division 2 shall, by regulation, define those efficacious services to be advertised by business or professions under their jurisdiction for the purpose of determining whether advertisements are false or misleading. Until a definition for that service has been issued, no advertisement for that service shall be disseminated. However, if a definition of a service has not been issued by a board or committee within 120 days of receipt of a request from a licensee, all those holding the license may advertise the service. Those boards and committees shall adopt or modify regulations defining which services may be advertised, the manner in which defined services may be advertised, and restricting advertising which would promote the inappropriate or excessive use of health services or commodities. A board or committee shall not, by regulation, unreasonably prevent truthful, nondeceptive price or otherwise lawful forms of advertising of services or commodities, by either outright prohibition or imposition of onerous disclosure requirements. However, any member of a board or committee acting in good faith in the adoption or enforcement of any regulation shall be deemed to be acting as an agent of the state.

(j) The Attorney General shall commence legal proceedings in the appropriate forum to enjoin advertisements disseminated or about to be disseminated in violation of this section and seek other appropriate relief to enforce this section.

Notwithstanding any other provision of law, the costs of enforcing this section to the respective licensing boards or committees may be awarded against any licensee found to be in violation of any provision of this section. This shall not diminish the power of district attorneys, county counsels, or city attorneys pursuant to existing law to seek appropriate relief.

16 California Code of Regulation § 1363.5. Advertising of Specialty Board Certification.

(a) As used in this section,

(1) "specialty board" means a board or association which certifies physicians in a specialty or subspecialty area of medicine.

(2) "Specialty or subspecialty area of medicine" means a distinct and well- defined field of medical practice. It includes special concern with diagnostic and therapeutic modalities of patients' health problems, or it may concern health problems according to age, sex, organ system, body region, or the interaction between patients and their environment. A medical specialty promotes the standards of practice within its specialty association.

(b) If a physician advertises that he or she is certified by a specialty board or association in a specialty or subspecialty area of medicine and that specialty board or association is not a member board of the American Board of Medical Specialties (ABMS) or does not have a postgraduate training program approved by the Accreditation Council for Graduate Medical Education (ACGME) or the Royal College of Physicians and Surgeons of Canada (RCPSC), then the specialty board or association shall be approved by the Division of Licensing and shall comply with all of the following requirements:

(1) The primary purpose of the specialty board shall be certification in a medical specialty or subspecialty. The specialty board shall encompass the broad areas of the specialty or subspecialty.

(2) The specialty board shall not restrict itself to a single modality or treatment which may be part of a broader specialty or subspecialty.

(3) If the specialty board certifies professionals other than physicians, the specialty board shall not represent either that (i) the criteria set forth in these regulations or (ii) the medical board's approval of the specialty board's certification program is applicable to nonphysicians.

(4) The specialty board shall be a nonprofit corporation or association, and it shall have at least a total of 100 members located in at least one-third of the states who shall possess a clear and unrestricted license to practice medicine.

(5) The specialty board shall have articles of incorporation, a constitution, or a charter and bylaws which describe its operation. The bylaws shall:

(A) provide for an independent and stable governing body with staggered, limited terms of not more than six years that is internally-appointed or selected by the members.

(B) set forth the requirements and policies for certification by the specialty board.

(C) require that the specialty board promote the public interest by contributing to improvement of medicine by establishing requirements and evaluating applicants who apply.

(D) require that the specialty board determine whether applicants have received adequate preparation in accord with standards established by the specialty board.

(E) require evidence that applicants have acquired capability in a specialty or subspecialty area of medicine and will demonstrate special knowledge in that field.

(F) require that the specialty board conduct comprehensive evaluations of the knowledge and experience of applicants.

(6) The specialty board shall have standards for determining that those who are certified possess the

knowledge and skills essential to provide competent care in the designated specialty or subspecialty area.

(7) More than 80 percent of the specialty board's revenue for continuing operations shall be from certification and examination fees, membership fees and interest and investment income.

(8)(A) Except as provided in subparagraph (B) or (C) of this paragraph (8), the specialty board shall require all applicants who are seeking certification to have satisfactorily completed a postgraduate training program accredited by the ACGME or the RCPSC that includes identifiable training in the specialty or subspecialty area of medicine in which the physician is seeking certification. This identifiable training shall be deemed acceptable unless determined by the Division of Licensing to be either (1) inadequate in scope, content and duration in that speciality or subspecialty area of medicine in order to protect the public health and safety or (2) not equivalent in scope and content to the residency training required for board certification by any related ABMS board for the specific conditions, disease processes and surgical procedures within the scope of the applicant certifying board's examination and certification.

(B) If the training required of applicants seeking certification by the specialty board is other than ACGME or RCPSC accredited postgraduate training, then the specialty board shall have training standards that include identifiable training in the specialty or subspecialty area of medicine in which the physician is seeking certification and that have been determined by the Division of Licensing to be equivalent in scope, content and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine. This training shall be

evaluated by the Division of Licensing to ensure that its scope, content and duration are equivalent to those of an ACGME or RCPSC accredited program and are adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety.

(C) In lieu of the postgraduate training required under subparagraph (A) or (B) of this paragraph (8), the specialty board shall require applicants seeking certification to have completed (1) a minimum of six years of full time teaching and/or practice in the specialty or subspecialty area of medicine in which the physician is seeking certification and (2) a minimum of 300 hours of continuing medical education in the specialty or subspecialty area of medicine in which the physician is seeking certification which is approved under Section 1337 and 1337.5 of these regulations. Any teaching experience acceptable under this subparagraph shall have been in a postgraduate training program accredited by the ACGME or RCPSC or that meets the standards set forth in subparagraph (B) that includes identifiable training in the specialty or subspecialty area of medicine to be certified. This training shall be evaluated by the Division of Licensing and determined to be equivalent in scope, content, and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine and to be adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety. Teaching or practice experience accepted under this subparagraph shall be evaluated by and acceptable to the credentials committee of the specialty board pursuant to standards that are (1) specified in the bylaws of the specialty board and (2) approved by the Division of Licensing in

accordance with criteria set forth in these regulations.

Physicians applying for certification who qualify under this subparagraph shall be required by the specialty board to have satisfactorily completed an ACGME or RCPSC accredited residency training program. This residency shall have provided training in the conditions and disease processes that are included in the new specialty.

Physicians who are certified by specialty boards under this subparagraph which are incorporated, or organized as an association on the effective date of these regulations, may advertise their board certification for three years from the effective date of these regulations. During that time, the specialty board shall demonstrate to the satisfaction of the Division of Licensing that there is in existence one or more postgraduate training programs that include identifiable training in the specialty or subspecialty area of medicine to be certified that meet the requirements of subparagraph (A) or (B) of this paragraph (8); then the specialty board's approval shall be permanent unless withdrawn under subsection (c). This training shall be evaluated by the Division of Licensing and determined to be equivalent in scope, content, and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine and to be adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety. If a specialty board cannot demonstrate its equivalency to ABMS boards in the three years following the effective date of these regulations, its members may not thereafter advertise certification by that board. This period may be extended for a year if the Division of Licensing determines that the specialty board is making a good faith effort towards achieving

equivalency to ABMS boards.

Physicians who are certified by specialty boards under this subparagraph which are incorporated, or organized as an association after the effective date of these regulations, may not advertise their certification until the specialty board is determined by the Division of Licensing to be equivalent to ABMS boards. The specialty board shall demonstrate to the satisfaction of the Division of Licensing that there is in existence one or more postgraduate training programs that include identifiable training in the specialty or subspecialty area of medicine to be certified that meet the requirements of subparagraph (A) or (B) of this paragraph (8). This training shall be evaluated by the Division of Licensing and determined to be equivalent in scope, content, and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine and to be adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety.

(9) Except as provided in subparagraph (8)(C) above, at the time of application for approval to the Division of Licensing, a specialty board shall demonstrate that one or more postgraduate training programs are in existence and that these programs provide identifiable training in the specialty or subspecialty area of medicine in which physicians are seeking certification. This training shall be evaluated by the Division of Licensing and determined to be equivalent in scope, content and duration to those of an ACGME or RCPSC accredited program in a related specialty or subspecialty area of medicine and to be adequate for training in that specialty or subspecialty area of medicine in order to protect the public health and safety.

The specialty board shall submit a plan that (A)

estimates the number of physicians to be certified through subsection (b)(8)(C), above; (B) specifies the number and location of post graduate training programs developed and to be developed; the number of trainees completing the training annually; (C) demonstrates the equivalency of those programs, as provided for in subsection (b)(8)(B), above; (D) provides for monitoring to evaluate the quality of existing programs; and (E) allows for upgrading of the parameters of the specialty or subspecialty area of medicine to accommodate new developments.

Every year the specialty board shall report to the Division of Licensing its progress in implementing the plan for postgraduate training programs in the specialty or subspecialty area of medicine in which physicians are seeking certification. Failure to so report shall be grounds for withdrawal of approval by the division. Failure of a specialty board to establish to the satisfaction of the division that it is in compliance with its plan, as stated in its original submission to the division, shall be grounds for withdrawal of the division's approval of the specialty board. Failure of a specialty board to provide evidence that the postgraduate training programs are equivalent in scope, content and duration to those of ACGME or RCPSC accredited programs shall be grounds for withdrawal of the approval.

(10) The specialty board shall require all physicians who are seeking certification to successfully pass a written or an oral examination or both which tests the applicants' knowledge and skills in the specialty or subspecialty area of medicine. All or part of the examinations may be delegated to a testing organization. All examinations shall be subject to a psychometric evaluation. The examinations shall be a minimum of sixteen (16) hours in length. Those

specialty boards which require as a prerequisite for certification, prior passage of an ABMS examination in a related specialty or subspecialty area, may grant up to eight hours credit for the ABMS qualifying board examination toward the sixteen (16) hour testing requirement.

(11) The specialty board shall issue certificates to those physicians who are found qualified under the stated requirements of the specialty board.

(12) The specialty board shall assist in maintaining and elevating the standards of graduate medical education and facilities for specialty training in medicine in collaboration with other concerned organizations and agencies, and have a mechanism for assisting accrediting agencies in the evaluation of training programs.

(c)(1) Upon request the Division of Licensing will approve a specialty board if it meets the criteria set forth in these regulations. The division may withdraw the approval of a specialty board if the division finds that it fails to meet the criteria set forth in these regulations.

(2) Within 30 working days of receipt of an application for specialty board approval, the division shall inform the applicant in writing that it is either complete and accepted for filing or that it is deficient and what specific information or documentation is required to complete the application.

(3) Within 120 calendar days from the date of filing of a completed application, the division shall inform the applicant in writing of its decision regarding the applicant's approval as a specialty board.

(d) Specialty boards approved by the Division of Licensing shall certify every three years from the date of approval that they continue to meet the requirements of these regulations.

(e) The Division of Licensing shall conduct such evaluations as it deems appropriate to ensure that applicant boards applying to the division meet the criteria of these regulations.